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OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

MARCH 14 AND JULY 24, 2007

Serial No. 110–18

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OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION

WEDNESDAY, MARCH 14, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:00 a.m., in room 2123 of the Rayburn House Office Building, Hon. Edward J. Markey (chairman of the subcommittee) presiding.

Members present: Representatives Doyle, Harman, Gonzalez, Inslee, Hill, Boucher, Rush, Eshoo, Stupak, Engel, Green, Capps, Solis, Dingell, Upton, Hastert, Stearns, Deal, Cubin, Shimkus, Wilson, Pickering, Fossella, Radanovich, Walden, Terry, Ferguson and Barton.

Staff present: Johanna Shelton, Tim Powderly, Mark Seifert, Colin Crowell, Maureen Flood, Dave Vogel, Neil Fried, Courtney Reinhard.

OPENING STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS

Mr. MARKEY. Good morning. The subject of today's oversight hearing is the Federal Communications Commission. This year, as we look to the operation of the Commission, we will have the chance to assess whether the agency that is tasked with overseeing an important and vital sector of our national economy is properly organized for such a role. In particular, our oversight will analyze whether it is operating at maximum efficiency, what constructive proposals can be considered to improve its operations, whether it is adhering to congressional intent in implementing our Nation's laws and to what extent its policy agenda advances the public interest. An overarching goal for this subcommittee during this Congress will be to develop a plan for achieving ubiquitous, affordable broadband service to every American.

Right now, depending upon the ranking one chooses to cite, the United States is 15th in the world or 21st or 29th in broadband penetration. Certainly, some of the countries ahead of us in the rankings are not apt comparisons. Iceland, for example, is ahead of the United States but has half of its population in one city, Reykjavik, where the phone book lists people by their first name. Yet, several countries that have leapt ahead, Japan, the Netherlands,

Sweden, Israel, Finland, Canada, Belgium, surpass the United States not only in broadband penetration, but also in speed.

The Commission still defines broadband at a minimum of just 200 kilobits per second, a speed that would only be considered broadband service in many other countries if it had a good gust of wind behind it. The reality is that America currently suffers from the lack of an overarching broadband plan, a low speed threshold, poor data and threats to the openness of the Internet. The Commission has a role to play with Congress and this subcommittee in each of these areas. The Commission should explore ways to create incentives for investment in new technologies; how to animate the technology already in the ground, the copper network, for broadband services and competition; how to modernize and rationalize universal service and how to ensure that wireless broadband networks, municipal broadband networks and others can interconnect with the incumbent in an efficient and cost-effective way.

This subcommittee will hold several hearings on Internet freedom and network neutrality later this year, so I won't dwell on that subject here, other than to say it is an indispensable policy for the future of the Web and must be addressed in a way that safeguards the open architecture that has made the Internet so vital in so many sectors of our economy and our society.

An important step the Commission could also soon take to advance our broadband goals would be to revamp its data collection and analysis. We simply need a better and more accurate picture of broadband service in America. This will help policy makers identify solutions and fine tune remedies for overcoming obstacles and achieving our national goals. Improved data collection is something that also is a dire need in the area of media ownership. It is imperative that the Commission know the extent of minority and women-owned licenses. The fact that this information is not readily available to the public is alarming and hinders the Commission's work on promoting localism, media ownership, low power radio, small business participation in wireless auctions and other important initiatives. I hope that this can be addressed soon, as well.

And finally, I want to mention the Commission's cable franchise order, which the Commission adopted in December on a 3 to 2 vote. I am very concerned about the process by which the order was adopted and the effect that this order will have on funding the PEG channels and institutional networks or INETs. These local cable access channels provide an important local voice in a media environment marked by consolidation and INETs are often used for public safety in homeland security purposes.

This is an important hearing, and we welcome the FCC Commissioners here this morning, and we intend to have them appear as frequent guests of this subcommittee as we proceed forward this year. That concludes the opening statement of the Chair. We now turn and recognize the ranking member, the gentleman from Michigan, Mr. Upton.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Well, thank you, Mr. Chairman. I am glad daylight savings time changed. We all got here, most of us, on time, as well.

I thank you, as well as Chairman Martin and his colleagues for appearing before us this morning. While your positions may not be the most glamorous in government, they are indeed among the most important, and I welcome all five of you, and I look forward to having an in-depth discussion on a host of issues today.

It is an exciting time in the world of telecommunications. Technology plays an integral role in all of our lives. We have seen tremendous advancements in the last decade, and one can only imagine what the next decade will hold. As the ranking member of this subcommittee, I envision a tech sector that is indeed ripe for growth. But we do have a responsibility to ensure that we do not over-regulate industry with burdensome red tape. Last year, the House overwhelmingly, by a super majority vote of 321 to 101, threw its support behind creating a national cable franchise process to knock down barriers and to streamline the process for the competitive cable entry into towns, cities, villages and counties all across the country.

And while a national franchise is a commonsense solution that would have leveled the playing field and expedited new entrants into the marketplace, our legislation, unfortunately, did not survive the 109th Congress. But the end of the last Congress did not put an end to the conversation. Although our bill did not become law, the mission continues, and I applaud the FCC for attempting to accomplish some of the same objectives that we were striving for via their rulemaking process. The FCC's action was an important first step, and I hope that as they move forward, they take the necessary steps to include existing cable companies under the umbrella, as well.

Our legislation struck the right balance for consumers, providers and municipalities, and I would like to think that our bill helped to lay the framework for States to purse their own franchise bills. California recently became the ninth State to change its law to allow statewide video franchise licenses and I am pleased that my State of Michigan also adopted a streamlined process, and 14 other States are also currently considering similar legislation.

As each State allows statewide entry into the video market, consumers shortly thereafter reap the benefits, enjoying more services at lower prices. States changing their teleco laws also allow for the further deployment of broadband and while the tech sector is the engine that drives the Nation's economy, there is no question that our economic growth is directly related to broadband deployment. Broadband is the equivalent of the country's interstate highway system of the 1950s. Communities that were not located near an exit or an on-ramp experienced little growth through the decades. The same can be said as we look at broadband.

As the chairman said, we are all embarrassed to say that the U.S. currently ranks 12th among developed nations in access to broadband, even behind Japan, Korea and Iceland. We must continue fostering greater broadband deployment and access nationwide through deregulation, as well as further development deployment of the spectrum, such as with the DTV legislation, which will help deliver broadband to communities throughout the country, including the most rural of locales. If our communities are not wired, then we will continue to fall further behind other nations.

In addition to broadband deployment, I remain quite concerned on a number of issues. Media ownership caps continue to thwart the broadcast industry. As we speak, the WARN Commission is working to establish a national alert system for the 21st century. The NTIA's announcement this week on converter boxes reminds us that the DTV transition is on the horizon. I look forward to hearing the Commissioners' thoughts on these and other issues of critical importance.

And lastly, I want to commend all of your work, particularly Chairman Martin, for being such a loyal partner in our effort to increase the fines for indecency by tenfold. The new law which President Bush signed last June delivered something of real value to families across the Nation, and I would remind all of us that it was with strong bipartisan support in not only this subcommittee, but the entire Congress, that saw the enactment of this important legislation.

I want to thank all of you for being here this morning. Look forward to your testimony and the dialog that we will have, and I yield back. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. We recognize the gentleman from Pennsylvania, the vice chair, Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Chairman, and thank you for holding this hearing. It is an important hearing, and welcome to the members of the Commission. Mr. Chairman, I have many, many questions today, so I am going to waive my opening statement and take the time on the back end.

Mr. MARKEY. The Chair recognizes the gentlelady from California, Ms. Harman.

OPENING STATEMENT OF HON. JANE HARMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. HARMAN. Thank you, Mr. Chairman. I would like to welcome the members of a very important regulatory commission, especially Commissioner Tate, who is making her first appearance before us. That may be true of Commissioner McDowell, as well. Two out of five. You toil on matters big and small. In the small category, though big to my constituents, I want to thank you again for your heroic, though unsuccessful, efforts to block needless area code splits in California. As for the big category, as stewards of spectrum licenses, you decide who will get to use the public airwaves. For our Nation's first responders in the communities they serve, this can be, this is, a life and death decision.

It is astonishing that leaps and bounds in technology, represented by the BlackBerries and cell phones in this room, seem to have passed over our firefighters and police officers. The DTV transition deadline is less than 2 years away. By my lights, it should be much sooner. But nonetheless, the auction of 700 MHz will take place in less than 1 year, and the $1 billion grant program for inoperability will be out the door this fiscal year. We need a quick resolution on your rulemakings for public safety broadband networks in the 700 MHz band, otherwise we risk wasting Federal money and local agencies' time and efforts to build networks within a regional and national framework.

I can't stress how important this is. As Katrina showed us, the lessons of the 9/11 attacks will haunt our Nation until we get it right. I am one who sadly believes we are probably in store for more natural and more terrorist attacks in this country, and they could come at any time. We still don't have the infrastructure for interoperable communications. A lot of this rests on you, and I would hope, as one member of this committee, that we can provide all the support you need to make the best and wisest decisions quickly so we can get on with it. I yield back the balance of my time.

Mr. MARKEY. The gentlelady's time has expired. The gentleman from Mississippi, Mr. Pickering.

Mr. PICKERING. Mr. Chairman, I will waive the rest of my time and save those for the questions. Thank you.

Mr. MARKEY. Gentleman from Oregon, Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman. I, too, am going to waive and save the time for questions.

Mr. MARKEY. The gentleman from Texas, Mr. Gonzalez.

Mr. GONZALEZ. Waive opening.

Mr. MARKEY. The gentleman from Indiana, Mr. Hill.

Mr. HILL. Mr. Chairman, I, too, will waive my opening statement and ask questions later on.

Mr. MARKEY. The gentlelady from California, Ms. Eshoo.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman. Chairman Martin and Commissioners, welcome to the Energy and Commerce Committee. I can't help but think that you might have needed someone to help guide you to the place because it has been a very long time since the Commission has been here. Actually, it is 3 years ago this month when the Commission was here at that time, the Janet Jackson-inspired indecency hearing, and I really don't recall the last time the full Commission has been here. So this is an important hearing, and Mr. Chairman, thank you for calling it.

Chairman Martin, I am particularly pleased to see you because I am eager to hear from you about your management of this all-important agency. I continue to hear concerns from my constituents and many others; many, many complaints about matters before the Commission, complaints that the Commission is unresponsive, insular and even capricious, at times, in terms of its actions. From the mundane, everyday business of the Commission to actions surrounding mergers of some of the largest corporations in the world, there is a consistent thread about the Commission and that is that it is nontransparent, has a heavy-handed decision making process during your tenure as chairman.

I am being very rough on you, but I think these are things that we really need to talk about and get out on the table, and as I said, it has been a long time since the Commission has been here. What concerns me most is the lack of transparency and the fairness in the Commission's deliberations regardless of the outcome. Sometimes we agree, other times we don't agree. That is not the point. Many of the actions taken by the Commission in recent years bear

out what I just said. But I think that the consideration of the recently concluded AT&T-BellSouth merger is the most troubling, at least it is to me.

You were clearly intent on expediting the AT&T-BellSouth merger, and I think being expeditious is important, because these are timely decisions. And we can agree to disagree on whether completion of the merger was grounded, really, in the interests of consumers, but what I don't agree with and what I certainly don't support are the lengths to which you, as the chairman, went to to try to force the merger through the Commission.

In particular, I think you are now the father of a new word in the English language, and that is "unrecuse." I have never heard of unrecuse before. I thought if one recuses themselves, that that stands, and I found that tremendously troubling, and I salute Commissioner McDowell in how he conducted himself, but that essentially that he was forced to participate in the merger proceedings, I think is cause for deep concern. It is very difficult to develop consensus, but really, as policy makers, that is the job that is given to us, especially in the public square, because we are not here for ourselves, we are here to represent the people of our country.

I don't think that action has instilled confidence in the Commission with the American people. This is all public and of all places, the Federal Communications Commission. So it is very troubling to me. And then once that failed and then you had to achieve a bipartisan consensus to approve the merger, you and Commissioner Tate, whom I welcome here today, took the extraordinary step, and I don't know if this has ever been done at the Commission before, to disavow many of the critical merger conditions to which you and AT&T had agreed. I mean, this is the equivalent of signing statements; where the president signs legislation and then says I don't like parts of it, so I am not going to honor it. And so I think we have to have a discussion of that.

So welcome to the committee. I look forward to the testimony, and I certainly look forward to the questions that we will pose and your answers to them.

Mr. MARKEY. The gentlelady's time has expired. The gentlelady is also right. It is unusual to have the FCC here. It may be impossible to reunite the Beatles, but for the first time in 3 years, we have reunited the FCC in front of this committee, so it is a big historic day. Let me turn and recognize the gentleman from Michigan, the chairman of the full committee, Mr. Dingell.

OPENING STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

The CHAIRMAN. Mr. Chairman, I thank you for your courtesy and I commend you for holding this hearing. It has been 4 long years since this committee conducted a general oversight hearing on the Federal Communications Commission. Indeed, this is the first such hearing for this chairman in his new role and for two of the remaining Commissioners.

The FCC is an independent agency created by the Congress. It is an arm of the Congress. And this committee, a committee on which I have proudly served for some while, has jurisdiction over

this agency and the Nation's telecommunications laws. I have great respect for the important work of the FCC and its Commissioners. The FCC writes regulations for industries that are vital to our democracy and to our economy. The laws charge the FCC with serving the public interest. That means all parties, rich, poor, minorities, small business owners, large business owners, rural residents, people with disabilities, should be fairly, properly and promptly treated by the Commission and its policies.

It is equally vital that this committee exercise vigilant and proper oversight of FCC activities. For some time, the Commission has not been subject to an appropriate level of congressional oversight. This oversight slumber seems to have led to some rather unfortunate and unwelcome consequences. The FCC has strayed from its sole duty; that is to implement the laws as passed by the Congress. The FCC is not a legislative body. That role resides here, in this room, with the people's elected representatives. And it is also not an arm of the administration, something which no administration in my recollection has understood fully, but it is something that Sam Rayburn believed in very strongly, and it is something which the current occupant of the chair of this committee believes with equal strength.

Now, when the FCC loses its proper role or proper sight of its proper role, consumers suffer, as does the credibility of the agency. I fear that this has too often been the case. Last December the FCC adopted a measure concerning cable television franchises. The matter was one on which Congress had been actively engaged. In 1984, those of us who wrote the law established well-defined and distinct roles in cable regulation for local governments and for the FCC. If reform of that regulatory structure is necessary, then it is the Congress's prerogative to undertake such action, as we have done before. It is not, however, a role for the FCC.

In this case, the Commission, not the Congress, preempted local governments on matters involving municipal property. The Commission had good intentions, and I hope they were good, notwithstanding the fact that the Congress already has assigned franchising matters, such as franchising negotiations and universal buildout requirements, to local officials, not the FCC. I strongly support efforts to increase cable competition and lower prices for cable consumers and have been working for many years to achieve both of these goals.

The Commission must work, however, entirely within the framework of existing laws to achieve that goal, and it must respect the laws that are enacted by the Congress and not exceed the authorities which it is given. That, however, did not happen here. The Commission chose to ignore the well-settled divisions of responsibility. Such action is unwise and may, I fear, give rise to false hopes to consumers.

Furthermore, the Commission appears to be continuing a disturbing practice of voting on measures long before they are complete. Once voted, the Commission often takes months to issue a proper order. One such delay, the AT&T-BellSouth merger order, has forced dissatisfied parties into court where they are compelled to sue over a press release. I find nothing on this in the Administrative Procedures Act or in the histories of the legislative govern-

ment and the regulatory agencies. I find regulating by press release to be a curious way, then, to interpret the Administrative Procedures Act.

There is also the matter of forbearing from certain statutory provisions due to arbitrary inaction. In a recent case, a 2–2 tie resulted in the grant of a forbearance petition. Because the Commission failed to release an order in that case, it is not clear as to the precise relief which is granted or the reason for the decision or who will benefit and who will be hurt. It is not apparent to me how the public or the courts can judge the wisdom of agency activity in such circumstances.

There is also the matter of the Commission's responsiveness to consumers. I understand that the Commission has recently turned its attention to backlog consumer complaints, including thousands of do-not-call complaints dating back to 2003. We will be asking the Commission to make available to us some of these complaints and the Commission's response. I understand that the Commission's response, in some instances, is to return the complaint to the complainer with the request that further information be sent in complaints that are as much as 4 years old. I find this curious and discouraging, and I think that it raises questions about whether the Commission is working hard and whether we need to schedule an oversight hearing in this committee every month to keep the business of the Commission on track.

The FCC is an important instrument of Congress, designed to help the public good. Whether you have worked for political campaigns, the executive branch, Capitol Hill or the private sector, it is important to remember that once one assumes a seat on the Commission, one is obligated to act independently and to promote the public interest. I hope that from this committee meeting will come some strides in that direction for the committee, for the executive and for the FCC. Thank you, Mr. Chairman.

Mr. MARKEY. The Chair recognizes the gentleman from Nebraska, Mr. Terry.

Mr. TERRY. I will waive.

Mr. MARKEY. The gentleman from Georgia, Mr. Deal.

OPENING STATEMENT OF HON. NATHAN DEAL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. DEAL. Thank you, Mr. Chairman, and I would like to thank the Commissioners for being present with us today. I would just like to raise a few issues with you and hopefully hear your comments during your testimony or during the questioning period.

To start with, I would like to hear your opinion regarding the current Government regulated retransmission consent regime. When I first began talking about this issue a few years ago, I asserted that the system was broken and could cause harm to consumers. Recent events have unfortunately proven my assertion is true. Over the last 6 months, thousands of consumers have lost access to local broadcast programming due to failed negotiations. From what I understand, what we have witnessed to date may just be the tip of the iceberg. With everything I have seen, the retransmission consent system lacks the principles normally present in a

free market. I will say it again. Retransmission consent regime lacks the principles that we find in a free market.

I know the proponents of the current regulatory regime assert that because agreements are being reached, the system must be working. I am not convinced by that argument. Just because agreements ultimately are reached does not mean that the system is good and fair or that all parties are willing participants. The more I have learned about how this system works, the clearer it becomes to me that the retransmission consent negotiations are based on Federal regulations which do not grant a level playing field to all players. In short, I believe the current system leads to agreements based not on free market values but on who has the most leveraging power.

Second, I would like to learn what the Commission plans, when it plans to complete its proceedings and issue a final order in regard to white spaces. I believe it is important that we move to facilitate the use of unlicensed white spaces, as they will lead to increased broadband access for millions of Americans and enable a wide range of innovative wireless devices and services.

And lastly, I would like to ask the chairman, hopefully, to explain the Media Bureau's recent decision on set-top boxes. I have heard concerns from rural cable subscribers that the decision may lead them to pay $2 to $3 more on their cable bills each month, and it is possible that the Commission will soon review this issue.

Thank you, Mr. Chairman. I look forward to the comments and the questions.

Mr. MARKEY. The gentleman's time has expired. The gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Mr. Chairman, I welcome the Commission, and I would waive my opening and reserve my time for questioning, please.

Mr. MARKEY. Gentleman from New York, Mr. Engel.

OPENING STATEMENT OF HON. ELIOT L. ENGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. ENGEL. Thank you very much, Mr. Chairman, for holding this important hearing. It is absolutely imperative that we have the Federal Communications Commission Chairman and Commissioners testify on a regular basis. I would like to take this opportunity to address some issues of concern to me, but first, I would like to start by thanking the Commission for allowing WRCR, a local radio station in my district, to change its operating frequency from 1300 to 1700 kilohertz.

The change will greatly improve the coverage of this station. It is a valuable asset for Rockland County, NY, in the event of an emergency. Many people would turn their radio dial to WRCR for immediate, up-to-date information. Couldn't do it before because the signal wasn't good, and the new expanded coverage will guarantee that all residents of Rockland County will have this essential information, so I thank the Commission for its efforts.

Today we will hear many of our colleagues bring up an array of important issues that are within the FCC's jurisdiction. One issue that is of particular importance, obviously, is the state of the DTV

transition. The FCC has been tasked with the responsibility of the success of this transition. If they don't approach the analog cutoff date with care and consideration, the consumer, as we have said many times here before, millions of TV-viewing Americans will be left with a black screen on that day.

I am concerned that the FCC is relying heavily on a Web site to inform consumers about the transition and how to prepare for the analog cutoff day. I don't believe that is enough. Twenty-one million U.S. households rely on over-the-air TV. Many of them are minorities and have a combined income of $30,000 or lower and do not have immediate access to the Internet, and I am not convinced that simply a Web site will help these families, by itself.

The FCC has proposed a DTV program, which in 2008 was only allocated $1.5 million for outreach. If you contrast that with the city of Berlin, Germany, who accomplished an analog cutoff in 2003, city of 3.3 million, spent close to a million dollars in consumer education, while we have to educate 300 million citizens, and if we are only planning on spending $1.5 million, I really don't think that is enough, so I would like to explore that in some of the questions.

Obviously, also, I am very concerned about broadband penetration. The U.S. continues to languish behind other nations in broadband penetration, and the Commission ruled on streamlining the franchising process recently, so I would like to hear some statements about that. When we are talking about having the FCC ensure that competitors have access to provide video service to apartments and condominiums, I think we need to have some questions about that. I have also, in New York, we have our new governor, who was then attorney general, investigated into alleged pay-for-play practices between major record labels and radio stations, and I intend to ask some questions about that.

And I would also like to hear if we could sort of draw out the opinions of the XM and Sirius satellite radio services, which have decided to merge. We heard testimony just last week about that, and some of the argument is that satellite radio is just one part of the radio world, not just its own market. I would tend to agree with that and would wonder what the Commissioners have to say about that, so gentlemen and lady, I look very much forward to listening to all of you. It is nice to have two new Commissioners here and our three old friends, not really old, but our three friends, and again, thank you for the job you do. We may not always agree, but we know you do important work and we appreciate it. Thank you.

Mr. MARKEY. I thank the gentleman. The gentlelady from New Mexico, Mrs. Wilson.

Mrs. WILSON. Thank you, Mr. Chairman. I will reserve for questions.

Mr. MARKEY. The gentlelady from California, Ms. Solis.

Ms. SOLIS. I will waive.

Mr. MARKEY. She will waive her time, as well.

Mr. MARKEY. The gentleman from Illinois, Mr. Rush.

Mr. RUSH. Mr. Chairman, I will waive.

Mr. MARKEY. The gentleman from Washington State, Mr. Inslee, will reserve. And the gentleman from Texas, Mr. Green.

Mr. GREEN. I will reserve, Mr. Chairman.

Mr. MARKEY. I think that that is all of the opening statements that the subcommittee will entertain, and that will give us an opportunity to turn to our extremely distinguished panel this morning. Statements will be accepted for the record.

[The prepared statements of Mr. Pallone and Mrs. Capps follow:]

PREPARED STATEMENT OF HON. FRANK PALLONE JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Good morning Chairman Martin and other members of the Commission. I want to begin by thanking Chairman Markey for holding this long overdue oversight hearing.

The FCC, like every other agency of Government, is accountable to the people and the Congress. Yet, this Commission has decided to not follow that principle. As a creature of Congress, their job is to interpret the law, not to legislate it. Instead, they have decided to give itself the authority to pick winners and losers in the telecommunications marketplace, and the consumer is suffering.

We have witnessed inaction and backlogs over the past few years, which includes lengthy delays of very important matters to consumers. In fact, this FCC has the lowest output since 1994.

As a firm believer in competition, I have seen firsthand the benefits it provides to consumers. However, having only two realistic broadband choices is not competition. All consumers should have plenty of choices for broadband, leading to affordable prices and better services. But I am concerned that the FCC's recent policies and procedures have resulted in weak competition within the broadband marketplace.

The United States is the country that invented the Internet. However, it has fallen to 16th in the world in broadband penetration. I am also worried about the lagging broadband deployment, as well as the FCC's unreliable broadband data.

President Bush has urged that affordable high-speed Internet access be available to all Americans by 2007. However, he has not set out a national broadband policy. Meanwhile, the FCC recently released a "Broadband Report" in which they defined broadband with speeds of 200 Kilobits. This definition is from 1999 and is obsolete. Innovation has flourished over the past few years, and with services like YouTube and others that measure is no longer acceptable.

The report also measures penetration by ZIP codes, assuming a ZIP code is fully serviced if only one person has broadband. These types of measurements are flawed. I do not believe this committee and this Congress can enact the right policies if we aren't given an accurate overall picture.

More specifically, as the chairman of the Health Subcommittee, I recognize the importance high speed interactive broadband can have for health professionals and patients. As the Communications Workers of America cited in their recent report, "Speed Matters," high speed "enables remote monitoring, efficient chronic disease management and more effective responses to emergencies." Broadband gives healthcare great possibilities by increasing access, lowering costs and providing better flexibility.

The FCC is not proactively recognizing their responsibility to the American people. I hope with some more guided oversight, we can begin to address these important issues.

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Statement of the Honorable Lois Capps
Subcommittee on Telecommunications and the Internet
Oversight of the Federal Communications Commission
March 14, 2007

Thank you, Mr. Chairman. It's a pleasure to be here today.

Unfortunately, our nation is falling behind other advanced countries in broadband deployment and access.

While we were in the top five in the world in 2001, we have fallen to 12th, 16th, or even 21st, depending on what study you use.

And the FCC has largely stood on the sidelines during this period of relative decline.

We don't have a national broadband strategy.

In fact, we don't even have a good measure for which areas in our country have access to broadband.

The current measure considers a ZIP code served if one person who lives there has broadband.

This is obviously flawed, because the fact that one person on one end of a rural ZIP code has broadband doesn't mean her cousin fifteen miles west has access.

The FCC also has a dated definition of what constitutes broadband.

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The FCC also has a dated definition of what constitutes broadband.

200 kilobits downstream simply isn't broadband in today's world, especially when residential consumers in other nations are getting speeds more than 50 times as fast.

The FCC also doesn't possess the data we need to have on broadband pricing.

If broadband isn't affordable, Americans aren't going to sign up for it, and we as policymakers need to know how much our citizens are paying.

We need a common-sense broadband policy that promotes competition and gives Americans choice.

If we want the successors to Google, EBay and Amazon to be based in the United States, we need to improve our broadband infrastructure.

I hope we will take some steps toward doing that at today's hearing.

I also want to mention some other issues that I hope the FCC will consider.

When the FCC reclassified wireline broadband as an "information service" subject to Title I of the 1996 Telecommunications Act, consumers lost many significant privacy protections they had under Title II, including restrictions on slamming and the disclosure of consumer information.

At the same time, the FCC commenced a rulemaking to consider reinstating some of those consumer protections, but it's been a year and a half, and the rulemaking hasn't been completed.

Finally, a small cable operator in my district has told me that the costs of complying with CALEA are such that that company, and many others like it, may be forced to withdraw their rural broadband services.

I hope the FCC will review this issue very closely, keeping in mind the importance of broadband to rural areas.

Thank you very much.

Mr. MARKEY. The entire Federal Communications Commission, appearing before us. You can see that there is an intense amount of interest in your testimony here today. We welcome you back, Mr. Chairman, before the full committee. We look forward to your testimony and the testimony of any of the other Commissioners who wish to make opening statements and then we will turn to questions from the subcommittee members, so Mr. Chairman, whenever you are comfortable, please begin.

STATEMENT OF KEVIN J. MARTIN, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. MARTIN. Well, thank you, and good morning, Chairman Markey and Ranking Member Upton and all the members of the committee, and thank you for the opportunity to be here with you today. I have had the privilege of serving at the Federal Communications Commission for over 5 years, including 2 years as the agency's chairman, and during this period, my colleagues and I, following guidance from this committee and Congress, have overseen a telecommunications industry undergoing rapid and unprecedented change.

These changes have seen the telecommunications industry transition from a period of sharp decline to a time of significant growth. Ushered in by the broadband revolution, companies and consumers alike have finally found the promised land of convergence. Telephone calls are now being made over the Internet, television programs are increasingly watched on the computer, not on TV, and cell phones are mini computers. They take pictures, play songs, send e-mails and hopefully soon will even send and receive emergency messages.

These technological advances and converging business models are creating unparalleled opportunities and considerable challenges. With this guidance in mind, the Commissioners try to make decisions based on the fundamental belief in promoting a robust, competitive marketplace. Competition is the best method of delivering the benefits of choice, innovation and affordability to American consumers. Competition drives prices down and spurs providers to improve service and create new products.

The Government, however, still has an important role to play. The Commission has worked to create a regulatory environment that promotes investment in competition, setting the rules of the road so that players can compete on a level playing field. For instance, shortly after I became chairman, we removed legacy regulations like tariffs and price controls which discourage providers from investing in broadband networks. Since then, broadband penetration has increased, while the prices of DSL and cable modem services have decreased.

The Government also must act, when necessary, to protect consumers and achieve broader social goals. Public safety has been and will continue to be one of the Commission's top priorities. In the first major role in my tenure, we applied stringent 911 rules to VOIP telephone service providers. Many believe that our actions were too aggressive; the Commission unanimously disagreed. The 911 rules we applied require that people receive the same guaran-

teed access to emergency services as do those using traditional phones.

Broadband technology is a key driver of our economic growth and enables almost all of today's innovations. The ability to share increasing amounts of information at greater and greater speeds increases productivity, facilitates commerce and helps drive innovation. Perhaps most important, broadband has the potential to affect almost every aspect of our lives. During my tenure as chairman, the Commission has worked hard to create a regulatory environment that promotes broadband deployment. We have removed legacy regulations like tariffs and price controls that discourage carriers from investing in their broadband networks, and we work to create a regulatory level playing field among broadband platforms.

And we have begun to see some success as a result of the Commission's policies. According to the Commission's most recent data, high speed connections increased by almost 52 percent for the full year ending in June 2006. An independent study by Pew Internet and American Life Project confirmed this upward trend, finding that from March 2005 to March 2006, overall broadband adoption increased by 40 percent, from 60 to 84 million, twice the growth rate of the year before.

And perhaps most importantly, the Pew study found that the significant increase in broadband adoption was widespread and cut across all demographics. Broadband adoption grew by more than 120 percent among African Americans and by almost 70 percent among middle income Americans. During the same time, the average price of broadband paid by consumers has also dropped. The Pew study found that in February 2004 to December 2005 the average price for home broadband access fell from $39 to $36 per month, and for DSL, monthly bills fell from $38 to $32, or almost 20 percent.

And while the Commission has worked hard to promote broadband access, there is more we can do. The Commission is committed to obtaining better information about broadband deployment and services nationwide. Since I became chairman, we have already taken steps to improve the information we collect and report. For instance, for the first time last year, we began reporting information regarding different speeds of broadband connections. In addition, last September I brought forward proposals to gain an even better picture of broadband deployment in this country.

Wireless service is also becoming an increasingly important platform to compete with cable and DSL as a provider of broadband. To promote more choice for consumers among broadband providers, the Commission has made a significant amount of spectrum available on both a licensed and unlicensed basis that can be used to provide broadband services in municipalities, rural areas and across the country. In September, the FCC closed its largest and most successful spectrum auction, raising almost $14 billion, and the Commission is currently preparing to auction 60 MHz in the 700 MHz band.

The Congress recognized that competition in the video services market benefits consumers by resulting in lower prices and higher quality services. The cost of basic cable service has gone up at a disproportionate rate when compared against other communica-

tions sectors. The average price of the expanded basic cable package almost doubled between 1995 and 2005, increasing by 93 percent. However, where a second cable operator is present, cable prices are significantly lower, almost 20 percent lower. In December of last year the Commission took steps to streamline the franchise process and promote competition in the delivery of video programming.

Promoting competition and choice must continue to be a priority in the voice area, as well. We need to continue to ensure that new entrants are able to compete with incumbents for telecommunications services. We recently made clear that new telephone entrants, such as cable and VOIP providers, must be given access to local telephone numbers and be able to interconnect with incumbents to deliver local calls.

And finally, as I touched on in the beginning of my remarks, there are times when marketing forces alone may not achieve broader social goals. When I testified before this committee approximately a year ago, I recommended that unauthorized access to callers' phone records be made illegal and that the Commission's enforcement tools be strengthened. Since then I know the committee has been actively working on this issue, and the Commission has been working on its part, as well.

I propose that the Commission strengthen our privacy rules by requiring providers to adopt additional safeguards to protect consumers' phone records from unauthorized access and disclosure. Perhaps no other issue before the Commission garners more public interest than the periodic review of media ownership rules. The attention devoted to media ownership issues is not surprising, as the media touches almost every aspect of our lives. And critical to our review of media ownership rules is the collection of objective facts and an open dialog with the public. We have commissioned multiple economic studies and are engaging in hearings across the country.

I see that my time has expired, so I would just ask for my full written statement to be submitted for the record.

[The prepared statement of Mr. Martin follows:]

STATEMENT OF KEVIN J. MARTIN

Good morning Chairman Dingell, Chairman Markey, Ranking Member Barton, Ranking Member Upton and members of the committee. Thank you for the opportunity to be here with you today. I have a brief opening statement and then I look forward to answering any questions you may have.

I have had the privilege of serving at the Federal Communications Commission for over 5 years, including 2 years as the Agency's chairman. During this period, my colleagues and I, following guidance from this committee and Congress, have overseen a telecommunications industry undergoing rapid and unprecedented change.

These changes have seen the telecommunications industry transition from a period of sharp decline to a time of significant growth. Ushered in by the broadband revolution, companies and consumers alike have finally found the promised land of convergence. Telephone calls are now being made over the Internet and cable systems. Television programs are watched when and where we want them and are increasingly on the Internet. Cell phones are mini-computers. They take pictures, play songs and games, send e-mail, and hopefully soon will send and receive emergency messages in times of disaster. Teens talk to one another over IM, SMS and MySpace, not the telephone. They ignore the TV and stereo, downloading songs onto MP3 players and watching and posting videos on YouTube instead. As Time maga-

zine recognized, 2006 was the year of the individual, thanks in large part to how communications technologies and innovations have empowered us all.

These technological advances, converging business models, and the digitalization of services are creating unparalleled opportunities and considerable challenges. Faced with such fast-paced change, regulations and the Commission often struggle to keep up.

The FCC is an independent agency and a creature of Congress. Our highest priority, therefore, is to implement the will of Congress. In the Telecommunications Act of 1996, Congress instructed the Commission on how to approach such challenges. The preamble reads:

> An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Preamble, Telecommunications Act of 1996, Pubic Law No. 104–104, 110 Stat. 56 (1996). With this guidance in mind, the Commission has tried to make decisions based on that fundamental belief in promoting a robust, competitive marketplace. Competition is the best method of delivering the benefits of choice, innovation, and affordability to American consumers. Competition drives prices down and spurs providers to improve service and create new products.

The Government, however, still has an important role to play. The Commission has worked to create a regulatory environment that promotes investment and competition, setting the rules of the road so that players can compete on a level playing-field. For instance, shortly after I became chairman, we removed legacy regulations, like tariffs and price controls which discouraged providers from investing in broadband networks. Since then, broadband penetration has increased while the prices of DSL and cable modem services have decreased.

Government also must act when necessary to protect consumers and achieve broader social goals. Thus, while eliminating many economic regulations, the Commission recognizes that there are issues that the marketplace alone might not fully address. For instance, government should ensure that the communications needs of the public safety community are met and that new and improved services are available to all Americans, including people with disabilities, those living in rural areas and on tribal lands, and schools, libraries, and hospitals. For example, the Commission expanded the ability of the deaf and hard of hearing to communicate with their family, friends and business associates by requiring Video Relay Services (the preferred method of communication) to be offered 24 hours a day, seven days a week, and by recognizing IP Captioned phone service as a form of Telecommunications Relay Service.

INCREASING BROADBAND DEPLOYMENT

Broadband technology is a key driver of economic growth and enables almost all of today's innovations. The ability to share increasing amounts of information, at greater and greater speeds, increases productivity, facilitates interstate commerce, and helps drive innovation. But perhaps most important, broadband has the potential to affect almost every aspect of our lives. It is changing how we communicate with each other, how and where we work, how we educate our children, and how we entertain ourselves.

During my tenure as chairman, the Commission has worked hard to create a regulatory environment that promotes broadband deployment. We have removed legacy regulations, like tariffs and price controls, that discourage carriers from investing in their broadband networks, and we worked to create a regulatory level playing-field among broadband platforms.

We have begun to see some success as a result of the Commission's policies According to the Commission's most recent data, high-speed connections increased by 26 percent in the first half of 2006 and by 52 percent for the full year ending June 30, 2006.

An independent study by Pew Internet and American Life Project confirmed this upward trend, finding that from March 2005 to March 2006, overall broadband adoption increased by 40 percent—from 60 to 84 million—twice the growth rate of the year before. The study found that, although overall penetration rates in rural areas still lags behind urban areas, broadband adoption in rural America also grew at approximately the same rate (39 percent).

Perhaps most importantly, the Pew study found that the significant increase in broadband adoption was widespread and cut across all demographics.

According to their independent research:

• broadband adoption grew by almost 70 percent among middle-income households (those with incomes between $40,000 and $50,000 per year);
• broadband adoption grew by more than 120 percent among African Americans;
• broadband adoption grew by 70 percent among those with less than a high school education;
• broadband adoption grew by 60 percent among senior citizens.

The average price of broadband paid by consumers also has dropped in the past 2 years. The Pew study found that, from February 2004 to December 2005, the average price for home broadband access fell from $39 per month to $36 per month. For DSL, monthly bills fell from $38 to $32 or almost 20 percent.

While the Commission worked hard to promote broadband access and affordability, there is more we can do. The Commission is committed to obtaining better information about broadband deployment and services nationwide. Since I became Chairman, we have already taken some steps to improve the information we collect and report. For instance, for the first time last year, we began reporting information regarding different speeds of broadband connections (e.g., about services offered at speeds in excess of 200 kbps).

In addition, last September, I put forward a proposal to gain an even better picture of broadband deployment in this country. This proposal asks questions about how we can obtain more specific information about broadband deployment and consumer acceptance in specific geographic areas and how we can combine our data with those collected at the State level or by other public sources. By improving our data collection, we will be able to identify more precisely those areas of the country where broadband services are not sufficiently available.

I also have circulated our fifth inquiry into "whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." 47 U.S.C. §157 nt. In this Notice, we seek comment on all aspects of broadband availability, including price and bandwidth speeds. In particular, we seek comment on whether, given the evolution of technology and the marketplace, we should redefine the term "advanced services" to require higher minimum speeds. Between these two proceedings, it is my hope that the Commission will solicit the information necessary to better assess the competitive progress in the broadband market.

ENCOURAGING WIRELESS DEPLOYMENT

Wireless service is becoming increasingly important as another platform to compete with cable and DSL as a provider of broadband. To promote more choice for consumers among broadband providers, the Commission has made a significant amount of spectrum available on both a licensed and unlicensed basis that can be used to provide broadband service in municipalities, rural areas and across the Nation.

The Commission is working to make available as much spectrum as possible to put the next generation of advanced wireless devices into the hands and homes of consumers. In September the FCC closed its largest and most successful spectrum auction, raising almost $14 billion. The spectrum offered was the largest amount of spectrum suitable for deploying wireless broadband ever made available in a single FCC auction. The Commission specifically designated licenses for smaller and rural geographic areas to promote access by smaller carriers, new entrants, and rural telephone companies.

The Commission is currently preparing to auction 60 MHz in the 700 MHz band. This spectrum is also well-suited for the provision of wireless broadband, and the upcoming auction represents a critical opportunity to continue deploying wireless broadband services, especially to rural communities. Again, the Commission will consider the need to provide for smaller geographic licensing areas. I also believe we should consider adopting more stringent build out requirements to facilitate broadband deployment in rural and underserved areas.

On the unlicensed side, the Commission recently initiated a proceeding to resolve technical issues associated with "white spaces" to allow low power devices to operate on unused television frequencies. And the Commission has completed actions necessary to make available 255 MHz of unlicensed spectrum in the 5 GHz region, nearly an 80 percent increase.

The Commission is also considering an order that would classify wireless broadband Internet access service as an information service. This action would eliminate unnecessary regulatory barriers for service providers. This classification also would clarify any regulatory uncertainty and establish a consistent regulatory framework across broadband platforms, as we have already declared high speed Internet access service provided via cable modem service, DSL and BPL to be infor-

mation services. This action is particularly timely in light of our auctions which are specifically making available spectrum for wireless broadband services.

PROMOTING COMPETITION

Consumers today are benefiting from technological developments and innovation in media. DVRs, VOD and HD programming offer more programming to watch at any given time then ever before.

While consumers have an enormous selection of channels to watch, they have little choice over how many channels they actually want to buy. For those who want to receive 100 channels or more, today's most popular cable packages may be a good value. But according to Nielsen, most viewers watch fewer then two dozen channels. For them, the deal isn't as good.

The cost of basic cable services have gone up at a disproportionate rate—38 percent between 2000 and 2005—when compared against other communications sectors. The average price of the expanded basic cable package, the standard cable package, almost doubled between 1995 and 2005, increasing by 93 percent. The GAO and the Commission's most recent cable price survey found that while cable does face some competition from DBS, DBS and cable do not seem to compete on price. In other words, the presence of a DBS operator does not have an impact on the price the cable operator charges its subscribers. Significantly, however, where a second cable operator is present, cable prices are significantly lower—almost 20 percent ($43.33 without competition vs. $35.94 where there is competition).

Congress recognized that competition in the video services market benefits consumers by resulting in lower prices and higher quality of services. Indeed, one of the Communications Act's explicit purposes is to "promote competition in cable communications," and Congress expressly prohibited local authorities from granting exclusive franchises. In December of last year, the Commission took steps to implement section 621 of the Act, which prohibits local authorities from unreasonably refusing to award a competitive franchise.

We need to continue to take steps to remove regulatory barriers to competition in the video market by, for instance, ensuring that consumers living in apartment buildings are not denied a choice of cable operators. We need to continue our efforts to create a regulatory environment that encourages entry by making sure that competitive providers have access to "must-have" programming that is vertically integrated with a cable operator.

Promoting competition and choice must continue to be a priority in the voice arena, as well. We need to continue to ensure that new entrants are able to compete with incumbents for telecommunications services. For example, we recently made clear that new telephone entrants, such as cable and other VOIP providers, must be given access to local telephone numbers and be able to interconnect with incumbents to deliver local calls to them.

Similarly, the ability to port numbers between providers is critical. Customers should not be held hostage because a provider refuses to allow a customer to transfer his or her phone number to another wireless or wireline carrier. We need to ensure that porting numbers between providers, including between wireline and wireless carriers, is as efficient as possible.

PROTECTING CONSUMERS

There are times when market driven forces alone may not achieve broader social goals. And we must always be on alert for companies intentionally or unintentionally harming consumers. Among the issues the Commission is turning its attention to is the ability of unauthorized users to gain access to callers' phone records, or pretexting. As I testified before this committee approximately 1 year ago, the disclosure of consumers' private calling records is a significant privacy invasion. At that time, I recommended that this practice be made illegal and that the Commission's enforcement tools be strengthened. Since then, I know that this Committee has been actively working on this issue.

The Commission has been doing its part as well. I have proposed that the Commission strengthen our privacy rules by requiring providers to adopt additional safeguards to protect customers' phone record information from unauthorized access and disclosure. Specifically, the Commission would prohibit providers from releasing call detail information to customers except when the customer provides a password. Similarly, we propose to modify our current rules to require providers to obtain customer consent before disclosing any of that customer's phone record information to a provider's joint venture partner or independent contractor.

Recently, concerns about preserving consumers' access to the content of their choice on the Internet have been voiced at the Commission and in Congress. In its

Internet Policy Statement, the Commission stated clearly that access to Internet content is critical and blocking or restricting consumers' access to the content of their choice would not be tolerated. Although we are not aware of current blocking situations, the Commission remains vigilant and stands ready to step in to protect consumers' access to content on the Internet. Moreover, to better assess how the marketplace is functioning and address any potential harm to consumers, I have proposed the Commission examine this issue more fully in a formal Notice of Inquiry which is presently pending before my colleagues.

Perhaps no other issue before the Commission garners more public interest then our periodic review of the media ownership rules. Critical to our review of the media ownership rules is the collection of objective facts and an open dialog with the public. We have commissioned multiple economic studies and are engaging in hearings across the country in a range of markets. The goal of these hearings is to fully and directly involve the American people in this process. We held our first hearing in Los Angeles, where we focused on the ability of independent television producers to gain access to distribution. We also held a hearing in Nashville, in which we focused on the concerns of the music industry, and in Harrisburg, Pennsylvania, in which we focused on factors relevant to media ownership in that smaller market. The Commission's efforts to collect a full public record will continue in the months ahead.

The attention devoted to the media ownership issue is not surprising. The media touches almost every aspect of our lives. We are dependent upon it for our news, our information and our entertainment. Indeed, the opportunity to express diverse viewpoints lies at the heart of our democracy. We must balance concerns about too much consolidation and too little choice with appropriate consideration of the changes and innovation that are taking place in the media marketplace. We must make sure that consumers have the benefit of a competitive and diverse media marketplace.

At our public hearings, the Commission has heard a consistent concern that there are too few local and diverse voices in the community. Indeed diversity is one of the major principles underlying our rules governing broadcast ownership. Small and independently owned businesses can find it difficult to enter the broadcast industry due to financial and resource constraints. I have proposed several ways to better address these issues. For example, we could permit and encourage new entrants to operate broadcast television stations through voluntary arrangements with existing broadcasters. An eligible entity could lease a portion of a broadcaster's digital spectrum and obtain all the rights and obligations that accompany the operation of a broadcast television station. We also are considering other changes, such as modifying our "Equity Debt Plus" rule to facilitate the ability of eligible entities to enter into partnerships, and evaluating how our leased access rules are working.

ENHANCING PUBLIC SAFETY

The events of September 11, 2001 and the 2005 hurricane season underscored America's reliance on an effective national telecommunications infrastructure. Public safety has been and will continue to be one of the Commission's top priorities. The Commission must make sure that the public has the tools necessary to know when an emergency is coming and to contact first responders. And we must enable first responders to communicate with each other and to rescue the endangered or injured. The public and private sectors must also work together so that our communications system can be repaired quickly in the wake of a disaster. We recently created a Public Safety and Homeland Security Bureau to focus exclusively on these important needs.

Thank you for your time and your attention today. I appreciate the opportunity to share with you some of the Commission's recent progress. With that, I would be happy to answer any questions you may have.

Mr. MARKEY. Without objection, the full written statement of the chairman will be included in the record, as will the full written statements of all of the members of the Federal Communications Commission. Now I am going to ask any of the other Commissioners who wish to make opening statements, and I will recognize Commissioner Copps if he wishes to make a statement at this time.

STATEMENT OF MICHAEL J. COPPS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. COPPS. I do wish to make a statement. Thank you very much. Thank you, Chairman Markey, Ranking Member Upton, members of the subcommittee, thank you for the opportunity to return, at least briefly, to the Capitol, which was home to me for so many years, beginning almost 37 years ago, actually, to discuss with you the state of communications in our country and the role the FCC is playing today and what else it might do as we seek to bring the wonders of modern communications to all of our citizens.

I am constantly struck at how important this work is. Communications industries comprise one-sixth of our economy, according to many reports, and when you consider the social and cultural and political dimensions, there is no doubt in my mind that communications is the most formidable and influential enterprise in all of America. There is a lot of serious work ahead for all of us, if we are going to realize the potential of the technologies and the services rushing towards us in this hugely transformative digital age.

This work involves every sector of communications. Our media make impressive contributions to our communities every day, but we still do not have a media environment that fully or even adequately serves our democracy and the vibrancy of our citizens. Regarding broadband, without a well thought out game plan to bring the wonders of the Internet to everyone across our great land, millions of people are at serious risk of being left behind. On public safety, despite the horrible costs of 9/11 and Hurricane Katrina, we still are not ready for the next manmade or natural disaster. The last time a major disaster confronted our nation we were perhaps caught by surprise. If we are not ready next time, none of our fellow citizens is going to accept surprise as an excuse. So these three areas are my priorities at the Commission.

Let me start with the issue which is closest to my heart, and that is broadcast media. I met with many local broadcasters who work hard to serve the public interest, but the public-spirited part of the enterprise is being squeezed out. Too often the programs we receive are homogenized, creativity-killing and often gratuitously violent. Perhaps even worse, the dearth of political and community coverage threatens our democratic dialog and the independent viewpoints we depend upon to help us make good decisions for the future of our country. Localism, diversity and competition are not abstract constructions, they are the essential ingredients for keeping our Nation's media and our Nation healthy, vibrant and growing.

I am pleased that Chairman Martin is committed to complete our long-dormant localism proceeding before moving forward on media ownership, because so much of what is local has disappeared from so much of our media. In the last year I have participated in probably a dozen media hearings in localities around the country, and I am seeing a noticeable shift, and I think it is a remarkable one, in the last few months; a growing impatience with things as they are. Whether this is motivated by examples of new programming lows or the further consolidation of newsrooms, music playlists or a new spirit of change abroad in the land, I don't know, but I do

know this, whatever the reason, millions of people are no longer content just to defeat bad new media consolidation rules.

There is a thirst, and it is one that I share, for us to revisit the bad old rules that got us into this predicament in the first place. What many people want, and I wholeheartedly agree, is to bring back some basic public interest standards, a responsibility to serve the public good, to the broadcast media and to bring the spirit of public interest to our other media, as well. I hope we can talk more about this today, including the need for a credible broadcast re-licensing system and an equally compelling need to assure that the DTV transition in broadcasting is made to serve the public interest.

Turning briefly to telecommunications, I worry that we are teetering on the edge of a digital divide in the 21st century that may be more difficult to bridge than the one we encountered in the century just past. Our biggest infrastructure challenge as a Nation is bringing broadband to all Americans, and I mean all of our people. Each and every citizen of this great country should have access to the wonders of the Internet, whether they live in rural areas or tribal lands or in our inner cities, whether they have limited incomes or disabilities, whether they are schoolchildren or seniors.

The data are not encouraging. The ITU ranks your country and mine at 15th in the world in broadband penetration, and the ITU's more recent and nuanced Digital Opportunity Index has us at 21, right after Estonia and tied with Slovenia. That strikes me as 20 rungs too low for the United States of America. Do we expect our kids to enter the digital classroom and the digital world at dial-up speeds? We are paying a business and a competitive cost for this poor performance, too. Fewer Americans with broadband means a smaller Internet marketplace and a glass ceiling over the productivity of small businesses and entrepreneurs, especially in rural and inner city areas. Without this infrastructure, they enter the global competition with one hand tied behind their back. But what do we expect without having a real broadband strategy?

Perhaps the first step in developing a national broadband strategy is to develop more granular broadband data to identify where the problems lie and how best to craft solutions. There are folks in far off places like Japan and a few right here at home, like in Kentucky, that are doing this. I hope the committee will push the Commission to develop better data, propose creative solutions and be more proactive in working with you to develop a broadband strategy in the 21st century.

Let me just comment briefly on public safety, because that always is the most important obligation of a public servant. I believe that after 9/11, this agency allowed other people to marginalize or push aside the Commission, when we had the expertise and know how to meet the charge of title I, which is to protect the security and safety of the American people through the telecommunications infrastructure. Chairman Martin, to his credit, has made this a priority and in doing so has created a Public Safety and Homeland Security Bureau, and the Bureau is starting down this difficult road.

And it has adopted an initiative that I long advocated, of using the FCC as a clearinghouse so that a first responder in a little town in rural America doesn't have to start from scratch every time they try to put together a plan for public and homeland security.

And I think the chairman, I know, supports that, but it is going to take initiative and support, and we really need to make this happen, and your oversight will be helpful.

One minor thing can I mention real quick?

Mr. MARKEY. Very quickly.

Mr. COPPS. All right, very quick. I mentioned this in the Senate, too. I encourage you to consider modifying the closed meeting rules so that the five Commissioners, the Beatles down here, aren't just together in their act one time a month or a year or whatever it is up here, but let us get our act together down at the Commission. Let more than two Commissioners get together and meet and talk. I cannot think of a proceeding at the FCC that would not have been improved by our ability to get together and talk. Thank you very much. I ask permission that the rest of my statement be included in the record.

[The prepared statement of Mr. Copps follows:]

TESTIMONY OF MICHAEL J. COPPS

Chairman Markey, Congressman Upton, members of the subcommittee: Thank you for the opportunity to return, at least briefly, to the Capitol—which was home to me for so many years, beginning almost 37 years ago—to discuss with you the state of communications in our country and the role the FCC is playing today, and what more it might do, as we seek to bring the wonders of modern communications to all our citizens. I am constantly struck by how important this work is. Communications industries comprise one-sixth of our economy—and when you consider their social, cultural and political dimensions, there is no doubt in my mind that communications is the most formidable and influential enterprise in all the land.

There is a lot of serious work ahead for all of us if we are going to realize the potential of the technologies and services rushing toward us in this hugely transformative Digital Age. This work involves every sector of communications. Our media make many impressive contributions to our communities every day, but we still do not have a media environment that fully, or even adequately, serves our democracy and the vibrancy of our citizens. Regarding broadband, without a well thought out game plan to bring the wonders of the Internet to everyone across our great land, millions of people are at serious risk of being left behind. On public safety, despite the horrible costs of 9/11 and Hurricane Katrina, we still are not ready for the next man-made or natural disaster. The last time a major disaster confronted our nation we were perhaps caught by surprise; if we are not ready next time, none of our fellow citizens is going to accept surprise as an excuse. These three areas are my priorities as a commissioner.

Let me start with the issue many of you know is closest to my heart: the broadcast media. I have met with many local broadcasters who work hard to serve the public interest. But the public-spirited part of the enterprise is being squeezed out. Too often the programs we receive are homogenized, creativity-killing, and often gratuitously violent. Perhaps even worse, the dearth of political and community coverage threatens our democratic dialog and the independent viewpoints we depend upon to help us make good decisions for the future of our country. Localism, diversity and competition are not abstract constructions; they are the essential ingredients for keeping our Nation's media—and our Nation—healthy, vibrant and growing. I am pleased that Chairman Martin has committed to complete our long-dormant localism proceeding before moving forward on media ownership because so much of what is local has disappeared from much of our media. In the last year I have participated in probably a dozen media hearings in localities around the country. I am seeing in the last few months a noticeable shift—a growing impatience with things as they are. Whether this is motivated by examples of new programming lows, the further consolidation of newsrooms and music playlists, or a new spirit of change abroad in the land, I don't know for sure. But I do know this—whatever the reason, millions of people are no longer content just to defeat bad new media consolidation rules. There is a thirst—one that I share—for us to revisit the bad old rules that got us into this predicament in the first place. What many people want, and I wholeheartedly agree, is to bring back some basic public interest standards—a responsibility to serve the common good—to the broadcast media and to bring the spirit of public interest to other media as well. I hope we can talk more

about this today, including the need for a credible broadcast re-licensing system and an equally compelling need to assure that digital broadcasting is made to serve the public interest.

Turning briefly to telecommunications, I worry that we are teetering on the edge of a Digital Divide in the 21st century that may be more difficult to bridge than the one we encountered in the century just past. Our biggest infrastructure challenge as a nation is bringing broadband to all Americans—and I mean all of our people. Each and every citizen of this great country should have access to the wonders of the Internet—whether they live in rural areas, on tribal lands, or in our inner cities; whether they have limited incomes or disabilities; whether they are schoolchildren or seniors. The data are not encouraging. The International Telecommunications Union ranks your country and mine at 15th in the world in broadband penetration. And the ITU's more recent and nuanced Digital Opportunity Index has us at 21st— right after Estonia and tied with Slovenia. That strikes me as 20 rungs too low for the United States of America. Do we expect our kids to enter the digital classroom and the digital world at dial-up speeds?— We are paying a business and competitive cost for this poor performance, too. Fewer Americans with broadband means a smaller Internet marketplace and a glass ceiling over the productivity of small businesses and entrepreneurs, especially in rural and inner city areas. But what did we expect without having a real broadband strategy?

Perhaps the first step in developing a national broadband strategy is to develop better, more granular broadband data to identify where the problems lie and how best to craft solutions. There are folks in far off places like Japan, and a few right here at home, like in Kentucky, who are charting precisely where broadband is going, so we know the data can be gotten. I hope this Committee will push the Commission to develop better data, propose creative options and solutions, and be more proactive in working with you to develop a national broadband strategy for the 21st Century. We have at our agency some of the most skilled and talented experts in telecommunications in all the world; they can make a huge difference in helping us to meet and master the broadband challenge.

Finally, let me just comment on one of the more vexing problems that I know each of you is focused on: public safety. The most important obligation of any public servant is the safety of our people. I believe that after 9/11 this agency allowed others to step in to do the job that the FCC has the expertise and the know how to do—improving our communications capabilities in times of emergency. Chairman Martin, to his credit, has made this a priority and in doing so has created a Public Safety and Homeland Security Bureau, and the Bureau is starting down this difficult road. And it has adopted an initiative I long advocated, developing a communications clearinghouse for public safety and homeland security ideas so that local hospitals, charities, public safety officers, small businesses, and many others need not start from scratch when developing emergency communications plans. They don't have the time, money or people to start from scratch, and we need to find ways to help them. The new Bureau has only begun this effort, and its success will require a meaningful, on-going commitment of resources. But if we stick to it, we can save the country time, money and, perhaps, even lives.

During the Senate's FCC oversight hearing last month, I was pleased to hear bipartisan support for an admittedly more minor, but I think important, legislative initiative. I encourage you to consider modifying the closed meeting rule so that the five Commissioners could actually sit down and talk with one another occasionally. I can't think of any proceeding in recent years that would not have benefited from an open and frank exchange of ideas among us before we were expected to cast a vote. We are prohibited from doing this. The nine Supreme Court justices, the 435 members of this body, and most every other institution I can think of are encouraged to meet and exchange views before deciding outcomes. If it's good enough for them, it ought to be good enough for us.

Finally, in addition to talking with one another, the Commission must always work to expand its conversations with our fellow citizens. Business is obviously an important stakeholder in the work we do at the Commission, and it should be. But in communications, every American is a stakeholder, because each of us is affected in so many important ways. I believe that an important part of being a commissioner is to reach out to non-traditional stakeholders as well as traditional, to ensure that Commission decisions do indeed reflect the wide public interest. If business, government, and non-traditional stakeholders work together to build public-private partnerships, we can meet our many communications challenges in the coming years. In my view, that's how we built this great country, infrastructure challenge by infrastructure challenge. And it is how we can keep it growing and keep it great.

Mr. Chairman, members of the committee, thank you for your attention, and I look forward to our conversation this morning.

Mr. MARKEY. OK. Well, "Let It Be." Now we will recognize Commissioner Tate. I think this is your first appearance before the committee, and I would like to give you an opportunity.

Ms. TATE. Mr. Chairman, I am really less senior than Mr. Adelstein.

Mr. MARKEY. No, we appreciate that, but what we are trying to do, as we did in our opening statements, is to go back and forth.

Ms. TATE. How kind of you. I am sorry. Thank you.

Mr. MARKEY. Different parties.

Ms. TATE. It is my first time here.

STATEMENT OF DEBORAH TAYLOR TATE, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Ms. TATE. Good morning to Chairman Dingell. It was wonderful to see him and Chairman Markey and Ranking Member Upton. Thank you all for having us and especially for your leadership on these issues, as Congresswoman Harman said, that are sometimes life and death issues. It is also about our place in the global economy and indeed, our own national security and personal security. I would like to commend the ongoing work of the subcommittee in addressing issues from consumer privacy and spoofing to the DTV transition, public safety, interoperability and of course, universal service. This work is vitally important to all Americans, every one of us.

And I am glad we are having this dialog today, and I am glad we are going to continue to have these dialogs. I would like to thank Chairman Martin for his strong leadership and my fellow Commissioners for their commitment to trying to reach a consensus. We don't always agree, but we do it agreeably. The communications marketplace does continue to evolve every single day. Convergence, as we know, shakes the foundations of the old order, not only for consumers, but also for the industries that we oversee and of course, for we, the regulators, ourselves. It also creates real benefits through the introduction of dazzling innovations, incredible competition, not just among providers but across new market entrants and across platforms. It challenges us every single day to adapt our regulations to keep pace.

One challenge involves our review, as you have heard, of our broadcast ownership rules. As a State official, I didn't have the opportunity to review the effects and form an opinion on the FCC's rules. Therefore as we continue to hold public hearings all across the country, we were in El Segundo, CA, we were in Pennsylvania and in my hometown of Nashville, I bring an open and inquiring mind to the issue. I look forward to joining my colleagues as we further the touchstone goals, your goals, of competition, localism and diversity.

Other media related issues impacting children and families present different challenges. The enforcement of your restrictions on the broadcast of obscene, indecent and profane programming probably draw the most attention to what we do. Thank you for your work on the Broadcast Indecency Enforcement Act, increasing

our fining ability. I am pleased that the FCC is also taking a leadership role with other Members of Congress regarding the national epidemic of childhood obesity through our task force, as well as our study on the effects of violent programming and advertising on children and the manner in which our children's programming rules will be applied to the new digital multicast world.

Certainly, as everyone here agrees, deployment of broadband is one of the biggest challenges facing America and all of us here in this room. I am committed, personally, to doing all I can to encourage that deployment that is so critical to our Nation, as new advanced services hold the promise of unprecedented e-commerce, distance learning, and e-health opportunities for all Americans, no matter where they choose to live. I am encouraged that we are taking positive steps, and I look forward to working with the subcommittee.

The almost uncontrollable growth in the Universal Service Fund represents another challenge. We have now reached almost $7 billion in outlays, $4 billion in the high-cost fund. Two weeks ago I was able to testify before the members of the Senate Commerce Committee working as the chairman of the Joint Board on Universal Service to ensure the sustainability of the fund in order to equip new generations of Americans to compete in this increasingly global economy. I believe that the time is now to take action and that we have made a great deal of progress in repair and revision of the fund. I look forward to working with all the members of the committee and my colleagues to ensure that all those, including those in high-cost areas, have affordable, quality communications and advanced services.

Like Congress, we have also been involved in protecting the privacy of confidential and delicate consumer information. We are now poised to issue rules designed to ensure the privacy of consumer information maintained by telecom providers. And finally, like my colleagues, I would like to touch on the issue of public safety. Last year, when I went to our panel reviewing the impact of Hurricane Katrina in Jackson, Mississippi, I heard firsthand the tragic and personal accounts of that devastation and the clear message was the need for interoperability and redundancy of networks.

I applaud the collaborative efforts that are ongoing with the entire communications and public safety industry. They have worked hard to address difficult policy and technical issues. We also established a new Public Safety and Homeland Security Bureau to facilitate more effective communications, no matter the disaster that we may face in the future, natural, terrorist or pandemic outbreak. These are both exciting and yet very sobering times to be at the FCC or to be on your committee.

I appreciate your invitation, and I look forward to any questions. Thank you.

[The prepared statement of Ms. Tate follows:]

Written Statement of
Commissioner Deborah Taylor Tate

Good morning Chairman Markey, Ranking Member Upton, and distinguished members of this Subcommittee. I appreciate the opportunity to participate in this hearing today, to engage in an open conversation regarding your thoughts and concerns about various issues currently or soon to be before us at the Federal Communications Commission.

At the outset, I want to commend Chairman Dingell, Subcommittee Chairman Markey, Ranking Member Barton, and Ranking Subcommittee Member Upton for their admirable leadership. As an FCC Commissioner, it is my role to implement the laws passed by Congress, and I look forward to working with all of the members of this Subcommittee to help shape our communications policy in the best interests of the American public.

I also would like to commend Kevin Martin for his strong and effective leadership as Chairman of the FCC. Commissioner Copps, Commissioner Adelstein, and Commissioner McDowell also deserve praise for their commitment to building consensus.

The communications marketplace continues to evolve daily, as convergence shakes the foundations of the old order for industry, for government, and for consumers alike. Converging technologies are blurring the lines between traditional communications platforms: we make telephone calls through our cable system, watch television on IPTV, and get Internet access from our electric company. While this convergence creates real benefits for consumers through the introduction of exciting services and increased competition – not only among service providers, but even across platforms – it also challenges us to adapt our regulations to these market changes. In

doing so, whenever possible, I believe we must promote balanced, technology–agnostic regulation, which provide incentives to investment and encourage innovation.

One challenge of this new digital age involves our review of the Commission's broadcast ownership rules. As a state and FCC Commissioner, I have been a proponent of outreach initiatives to solicit public input. Transparency in government decision-making is important and forms the basis of our nation's administrative procedure laws. Currently, we are in the process of hearing from the public on broadcast ownership and have held three of our planned six hearings across the country; the first in Los Angeles, California – where we were honored to have the participation of, among others, Congresswoman Maxine Waters, Congresswoman Diane Watson, the Reverend Jesse Jackson, and hundreds of citizens. The second hearing was in my hometown of Nashville, Tennessee – where we heard from music legends, songwriters, academics, citizens, and your colleagues, Congressman Jim Cooper, Congresswoman Marsha Blackburn, and newly-elected Congressman Steve Cohen. Our third and most recent hearing was held on February 23, 2007, in Harrisburg, Pennsylvania.

Given the important role that the broadcast media play in our democratic society's marketplace of ideas, I am committed to working with my FCC colleagues and members of this Subcommittee to ensure that our actions further the touchstone goals of competition, localism, and diversity. As we review our media ownership rules, however, we must be mindful of the ongoing, dramatic changes in the ways we – especially "generation-i," those raised with the Internet – receive our news, information, and entertainment, anytime, anywhere. And our mobile phones now provide us with stock quotes and e-mail updates from sources across the globe. We must make sure that we

account for these effects of the digital age, because, from a regulatory standpoint, the media marketplace of tomorrow is being shaped by our actions today.

Most of my professional life has been spent addressing issues of significant impact to children and families, and that did not stop when I arrived at the FCC. Although most media visibility surrounds our enforcement of congressional restrictions on the broadcast of obscene, indecent, and profane programming, other issues that we are addressing include the national epidemic of childhood obesity, the effect of violent programming and advertising on children as well as how our children's programming rules will be applied to the new, digital multicast world. These are important issues, and I am pleased that the FCC is taking a leadership role in addressing them.

Broadband deployment also is essential for the future of our country, not only for the communications industry, but also for every business in America and for our global competitiveness. It is extremely important that the Commission continue to promote the deployment of advanced networks capable of providing broadband and video services. Broadband promises unprecedented business, educational, and healthcare opportunities for all of us, no matter where we choose to live. The convergence of services and platforms – from broadband over power line, cable modem, and DSL, to fiber-optics, satellite, and wireless – will only help to further drive the need for better and more ubiquitous broadband throughout the country. Nearly 65 million Americans had access to high speed lines by June 2006, over a 50 percent increase in one year, with rural Americans more than doubling their broadband connections from 2003 to 2005. This is good news. While almost a third of the world's broadband connections are in the United States, we still have more to do. I am committed to working with my FCC colleagues

and members of this Subcommittee to encourage the further deployment of new and innovative services and to foster competition. Participation in the digital age requires broadband, and it is essential that we create an environment that maximizes its deployment. In addition, I also note that I support the Commission's *Internet Policy Statement* and believe it is vital that "consumers are entitled to access the lawful Internet content of their choice."

While I believe in general that the marketplace can best address many of the economic issues we face at the FCC, I am pleased that we continue to ensure that the critical needs of consumers are also addressed. My work as a state commissioner as well as the Chair of the Federal-State Joint Board on Universal Service has made it clear to me that the Universal Service Fund is a critical program for ensuring access for consumers in rural and high-cost areas and for promoting access to advanced services for schools, libraries, and rural heath care providers. However, the Universal Service Fund is now approaching nearly $7 billion in annual outlays. As the converging communications landscape changes, the Commission must recognize how technological changes are putting strains on the mechanics of our contribution and distribution systems which must be addressed by technology-neutral policies. Therefore, the Commission should consider potential reforms on both the contribution and the distribution side of the fund.

Currently, the Federal-State Joint Board is considering proposals designed to improve the distribution of high cost support to eligible providers, and we recently held an *en banc* meeting in Washington, D.C. to hear from experts on these matters. It is essential that we utilize technology neutral, fair and understandable systems to sustain and stabilize the fund. To do this, we must all work together – Congress, the industry,

and consumers – to put in place technology-neutral policies that provide incentives for effective and efficient use of the fund.

The FCC also continues to improve access to communications services for persons with disabilities by requiring interoperability among competing video relay service providers and approving innovative new services like IP-captioned telephone that improve access to communications for many Americans. Of course, more work lies ahead to ensure that we responsibly manage our obligations to achieve functional equivalence for all Americans.

Along with Congress, the Commission has also been active in helping protect the privacy of confidential and delicate consumer information. Last year, we opened a rulemaking to address the abhorrent practice of pre-texting to obtain consumer's private phone records, and we are now poised to issue final rules designed to ensure the privacy of consumer information maintained by telecommunications carriers. I would also like to commend this Subcommittee for its commitment to addressing this issue.

Last, but possibly most important, I would like to touch on the crucial issue of public safety and homeland security. While we continue to mourn the innocent lives lost and honor the brave and selfless acts of the first responders on September 11, 2001, and during the Hurricane Katrina and Rita disasters, we must also learn from our experience and equip the nation and our citizens to be able to communicate more effectively in such times. In March 2006, at the second meeting of the FCC Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks in Mississippi, I heard personal accounts of the devastation. The one clear message I heard was the need for redundancy. I applaud the collaborative efforts and contributions of the

communications and public safety industries, which have worked hard to address the policy goals and technical issues that make these necessary improvements possible.

My colleagues and I are keenly aware of how critical reliable communications technologies are when public safety or homeland security concerns become paramount and, therefore, launched our new Public Safety and Homeland Security Bureau. This action underscores the fact that the dissemination of vital information and interoperable communications at every level are the backbone of our defense against natural disasters, attacks on our homeland, and even the possibility of a pandemic, health-related, or environmental attack. I am confident that the Commission will continue to do all it can to strengthen and protect our Nation's communications infrastructure, and I am eager to work with this new Bureau and all members of Congress as we continue to address policies that will help improve our public safety and homeland security.

Again, I appreciate your invitation to be here with you today. I look forward to hearing from you, and I will be pleased to answer any questions.

Mr. MARKEY. Thank you, Commissioner Tate. Commissioner Adelstein, welcome back again, and whenever you are ready, please begin your testimony.

STATEMENT OF JONATHAN S. ADELSTEIN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. ADELSTEIN. Well, thank you, Mr. Chairman, Congressman Upton and members of the committee. I really appreciate the opportunity to testify here today. As Chairman Dingell noted, the Commission is an arm of the Congress, and it is good to be reattached to the body here today. I truly believe we function better to the degree that we are held accountable through oversight hearings like this. As an independent body of unelected officials, we will serve the public better to the degree that we are responsible to the people's representatives that are here today.

I think today we have the opportunity, through technology, to connect this country in profound ways. We need to provide for all of our citizens, including those in rural areas, insular areas and other high-cost areas, Native Americans, residents of our inner cities, minorities, those with disabilities, non-English speakers and low-income consumers. And we can do all of this while protecting the important privacy rights of consumers. We should upgrade our communications infrastructure in every corner of this country and make new technologies more widely available and affordable to everyone. All of our citizens should have the access, no matter where they are, where they live or what challenges they face.

To promote the communications needs of everyone in this country, we should focus on improving access to broadband services, modernizing universal service and promoting the public interest in our media. As a Commissioner, I have traveled to a lot of unique parts of this country, and I will never forget some of the things I saw. I remember on the Gulf Coast of Mississippi, near Congressman Pickering's district, we saw the devastation after Hurricane Katrina, and the enormous damage there reminds us of the needs of our public safety and national security communities, and those have to remain foremost in our minds.

One of our central national priorities is promoting the widespread deployment of broadband. Even though we have made strides, I am concerned that we are not keeping pace with our global competitors. This is more than a public relations problem. Citizens in other countries are simply getting more megabits for less money. That is a productivity problem, and our citizens deserve better, and we can do better. We have got to restore our place as the undisputed world leader in telecom. It warrants a comprehensive national strategy.

As you noted, Mr. Chairman, according to the ITU, the digital opportunity afforded to U.S. citizens is 21st in the world. It is not enough to battle our way to 20th place. We should be No. 1. We can start by improving our data collection to better ascertain our current problems and develop better responses. We must increase the status for investment and promote competition. We have got to make broadband truly accessible to everyone, even if that means communities tapping their own resources to the broadband systems. We must also work to preserve the open and neutral char-

acter that has been the hallmark of the Internet, maximizing its potential as a tool for economic opportunity, innovation and so many forms of public participation that we see on the Internet today.

Some have argued that our low broadband rankings are due to our rural geography. I know a little something about that, coming from South Dakota, but if that is the reason, I think we better redouble our efforts to make sure that we promote broadband in rural areas of this country. In that regard, it is vital to keep universal service on a solid footing. As voice becomes just one application over broadband networks, we should ensure that universal service evolves to promote advanced services, as Congress instructed us in the 1996 Act.

We must also do more to stay on top of the latest spectrum developments. Recent years have seen an explosion of new opportunities for consumers, like Wi-Fi. We have the creative approaches, technical, regulatory and economic, to get spectrum into the hands of all types of operators, large and small, particularly as we prepare for the upcoming 700 MHz auction, one of the most important undertakings that this commission, I think, will conduct in my time on it.

As for the media, let us never forget that the airwaves belong to the American people. With our ownership rules, I think we need to take far greater care than we have in the past before allowing any further concentration. We need to open our airwaves to community-based and minority voices. We need to establish the public interest obligations for broadcasters as they enter the digital age.

Finally, we were charged by Congress to perform as a law enforcement agency. We should be rigorous in enforcing all of the laws under our jurisdiction. We have a lot of issues before us, including the do not call directory, the junk fax rules, indecency, payola, video news releases and all of our sponsorship identification rules. We need to address them all vigorously. Mr. Chairman, I will carry out Congress's charge to keep the American public well connected and well protected. Thank you for the opportunity to testify, and I look forward to responding to any concerns you might have.

[The prepared statement of Mr. Adelstein follows:]

STATEMENT OF JONATHAN S. ADELSTEIN

Mr. Chairman, Congressman Upton and members of the subcommittee, today we have the opportunity through technology to connect this country in profound ways. Americans should be able to maximize their potential through communications, no matter where they live or what challenges they face. We need to provide for all of our neighbors, including those in rural, insular and other high-cost areas, as well as Native Americans, residents of our inner cities, minorities, those with disabilities, non-English speakers, and low-income consumers.

We must upgrade our communications infrastructure in every corner of this country. And we must do a better job of making innovative communications technologies more widely available and affordable. Understanding the communications landscape requires us to take account of the rapidly-changing marketplace and to reach out to diverse communities. To promote the communications needs of all Americans, we should focus on improving access to broadband services, modernizing universal service, and protecting diversity, competition, and localism in our media.

A top priority became starkly clear when I visited the Gulf Coast of Mississippi shortly after the devastation of Hurricane Katrina. The enormous damage to the entire region was unforgettable and remains a painful reminder that the communica-

tions needs of our public safety and national security communities must remain at the forefront.

One of our central challenges is promoting the widespread deployment of broadband facilities to carry new and innovative services. This must be a greater national priority than it is now. An issue of this importance to the economy and the success of our communities warrants a coherent, cohesive, and comprehensive national broadband strategy.

Virtually every other developed country has implemented a national broadband strategy. Even though we have made strides, I am concerned that the lack of a comprehensive plan is one of the reasons that the U.S. is nevertheless falling further behind our global competitors. Each year, we slip further down the regular rankings of broadband penetration. More troubling, there is growing evidence that citizens of other countries are getting a much greater broadband value, in the form of more megabits for less money. According to the ITU, the digital opportunity afforded to U.S. citizens is not even near the top, it's 21st in the world. This is more than a public relations problem. It's a productivity problem, and our citizens deserve better.

We must engage in a concerted and coordinated effort to restore our place as the world leader in telecommunications by making affordable broadband available to all our citizens. It will mean taking a hard look at our successes and failures and improving our data collection. A true broadband strategy should incorporate benchmarks, deployment timetables, and measurable thresholds to gauge our progress. It is not enough to rely on poorly-documented conclusions that deployment is reasonable and timely.

We must re-double our efforts to encourage broadband development by increasing incentives for investment, because we will rely on the private sector as the primary driver of growth. These efforts must take place across technologies so that we not only build on the traditional telephone and cable platforms, but also create opportunities for deployment of fiber-to-the-home, fixed and mobile wireless, broadband over power line, and satellite technologies. We must work to promote meaningful competition, as competition is the most effective driver of lower prices and innovation. This is increasingly important to ensure that the U.S. broadband market does not stagnate into a comfortable duopoly, a serious concern given that cable and DSL providers control 98 percent of the broadband market. We have got to make broadband truly affordable and accessible to everyone, even if that means communities tapping their own resources to build broadband systems. We must also work to preserve the open and neutral character that has been the hallmark of the Internet, maximizing its potential as a tool for economic opportunity, innovation, and so many forms of civic, democratic, and social participation.

To accomplish these ends, we must be creative and flexible in our approaches. Some have argued that the reason we have fallen so far in the international broadband rankings is that we are a more rural country than many of those ahead of us. If that is the case, we should strengthen our efforts to address any rural challenges head-on.

Congress and the Commission recognized early on that the economic, social, and public health benefits of the telecommunications network are increased for all subscribers by the addition of each new subscriber. Federal universal service continues to play a vital role in meeting our commitment to connectivity, helping to maintain high levels of telephone penetration, and increasing access for our Nation's schools and libraries. I have worked hard to preserve and advance the universal service programs as Congress intended.

It is important that the Commission conducts its stewardship of universal service with the highest of standards. It is important that we strive to consistently improve our performance, while at the same time ensuring that even well-intentioned reform efforts do not undermine the effectiveness of this critical program. Ensuring the vitality of universal service will be particularly important as technology continues to evolve. Increasingly, voice, video, and data will flow to homes and businesses over broadband platforms. In this new world, as voice becomes just one application over broadband networks, we must ensure that universal service evolves to promote advanced services, which is a priority that Congress has made clear.

The Commission also must do more to stay on top of the latest developments in spectrum technology and policy. Spectrum is the lifeblood for much of this new communications landscape. The past several years have seen an explosion of new opportunities for consumers, like Wi-Fi, satellite-based technologies, and more advanced mobile services. But, we have to be more creative with a term I have coined "spectrum facilitation." That means looking at all types of approaches—technical, economic or regulatory—to get spectrum into the hands of operators ready to serve consumers at the most local levels.

We should continually evaluate our service and construction rules to ensure that our policies do not undercut the ability of wireless innovators to get access to new or unused spectrum. I want to promote flexibility and innovation, but since the spectrum is a finite public resource, I want to see results as well—particularly in the area of wireless broadband, which has been a top priority for me while at the Commission. And I truly believe that our preparation for the upcoming 700 MHz auction is one of the most important undertakings the Commission will conduct in all of the time I have served.

This is a time of great change in telecommunications markets with the emergence of new services, increased convergence, and seismic structural changes among the market participants. For many residential customers, there is an emerging rivalry between traditional telephone providers and new cable entrants, along with an increasing opportunity for use of wireless and VOIP services. Nonetheless, the Commission must continue to promote competition between providers and to be vigilant about the potential impacts of increased consolidation in these markets. I have been concerned about the adequacy and vigor of the Commission's analysis in its consideration of recent mergers and forbearance petitions. I believe that the Act contemplates more than just competition between a wireline and cable provider and that both residential and business consumers deserve more.

As for the broadcast media, we should never forget that the airwaves belong to the American people. It is critical to preserve their access to what the Supreme Court has called the "uninhibited marketplace of ideas." As we review the ownership rules, we should first do no harm; we should take far greater care than we have in the past before permitting any additional media consolidation. Also, to make the media landscape look and sound like America, we need to open our airwaves to community-based and minority voices and improve minority and women ownership. The success of our review rests upon the degree to which the American people believe that their voices have been heard. Accordingly, transparency—relative to public hearings, Commission studies, and the public release of the specific rules before they are finalized—is essential.

The FCC launched its localism proceeding in 2003 to assess whether TV and radio broadcasters were addressing and satisfying the needs of local communities. The Commission should complete its review, make real recommendations to Congress, enhance public participation in the license renewal process, and propose other meaningful regulatory changes for public comment. This proceeding should conclude before, not after, our review of the broadcast ownership rules.

With less than 750 days to the end of analog broadcasting, I believe there is a critical need for greater national attention on the impending DTV transition. More focused leadership is needed. Currently, the DTV preparedness effort lacks a clear national message and a coordinated set of industry activities. To begin to address a general lack of public awareness, the Commission needs to take the following steps: (1) develop a unified, coherent message among Federal, State, local and tribal governmental entities; (2) coordinate the message and its delivery with the efforts of the broadcast, cable, satellite, and consumer electronics industries; and (3) educate insular communities about the consequences and benefits of the impending transition.

Failure to administer a comprehensive national DTV transition plan will almost certainly result in a tsunami of consumer complaints to congressional and other government offices from viewers across the country. To better manage this potential national disruption, I would recommend establishing a clear chain of command. While the NTIA is principally charged with administering the converter box program, the FCC's technical and consumer outreach expertise makes us especially well-suited to spearhead a national consumer education initiative. The two agencies should work collaboratively to develop a unified Federal message about the DTV transition and to inform consumers about options they have to continue receiving broadcast programming after February 17, 2009.

The Commission must also be mindful of the role of cable services in the media marketplace. The program access rules have played a key role in the development of competitive multi-channel video providers. The Commission must quickly renew its program access rules that prohibit exclusive contracts for satellite-delivered programming between vertically-integrated programmers and cable operators. The limitation will expire on October 5, 2007. Our examination of this issue should consider the needs of new entrants into the video market, companies that are essential to the future of video competition. The Commission should also look at our commercial leased access rules, which require cable operators to set aside channel capacity for commercial use by video programmers unaffiliated with the operator. We must take a hard look to see what we can to do to ensure that we truly foster diversity in video programming sources.

Finally, we are charged by Congress to perform as a law enforcement agency, and we should be rigorous in enforcing all of the laws under our jurisdiction. We have numerous issues before us regarding consumer complaints about the Do-Not-Call directory and our Junk Fax rules, indecency, payola, video news releases and our sponsorship identification rules. All of these laws are important, and all allegations of wrongdoing demand our resolute attention.

Congress has charged the Commission with ensuring that the American public stays well-connected and well-protected. I will do everything in my power to carry out the law to promote these goals. Thank you for the opportunity to testify.

Mr. MARKEY. Thank you, Commissioner, very much. And now making his debut before the Telecommunications and Internet Subcommittee, we welcome you, Commissioner McDowell. We look forward to your testimony. Please begin.

STATEMENT OF ROBERT M. MCDOWELL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. MCDOWELL. Thank you, Mr. Chairman, and I thank you, Ranking Member Upton, and good morning to all the members of the committee. Thank you for having us here before you this morning. After 16 years in the private sector, my 9-month tenure at the FCC has been incredibly exciting. I have been deeply honored to serve the American people in this position. I am also immensely fortunate to work with such talented colleagues and staff.

Today is a wonderful time to be at the FCC. Revolutionary technological developments are yielding untold opportunities for newly empowered consumers to improve the quality of their lives. This newest wave of dynamic disruption transcends traditional regulatory paradigms. From broadband availability to the incredible proliferation of wireless technologies, from universal service to localism and diversity in broadcasting, from wireless medical devices that improve thousands of lives each day to the greatest entrepreneurial explosion in history known as the Internet, the issues addressed by the FCC touch the lives of every American.

I endeavor to approach each issue with a consistent regulatory philosophy; one that has served our Nation well since its inception; one that trusts competitive free enterprise to serve consumers best. Overall, I trust free people acting within free markets to make better decisions for themselves than those of us in Government. However, should the free market fail, governments should be poised to serve the public interest by addressing such failure in a narrowly tailored fashion. As we approach each matter before us, we should remind ourselves that free markets and free ideas are the essence of our free society and promoting freedom is the FCC's core mission. And we are doing exactly that.

The Commission is adopting policies to encourage more freedom, especially through increased broadband deployment for all Americans. While America's rate of broadband deployment has more than doubled during the Martin chairmanship, from 20 percent growth and penetration per year to 40 percent growth last year, to a current growth rate of 52 percent, we are pressing hard for greater advancements. In fact, we are all working hard to make it easier for entrepreneurs of all kinds to construct innovative broadband delivery platforms even faster.

Opening these new windows of opportunity will create a new wave of capital investment that will stimulate our economy and make America more competitive across the globe. The construction of these advanced platforms also will enhance American consumers' ability to choose and therefore strengthen their freedom. All of us will benefit as a result.

Among the highlights of my first 9 months was our advanced wireless services auction last summer. It was phenomenally successful and brought in nearly $14 billion to the U.S. Treasury. Over half of the successful bidders were small businesses or other designated entities. New uses for this spectrum will yield tremendous benefits. Furthermore, our recently issued video franchising order will enhance video competition and accelerate broadband deployment. And much more lies ahead, including launching the 700 MHz auction, ensuring the DTV transition goes smoothly, appropriate management of television white spaces, maximizing uses of the public safety spectrum, adopting a digital audio broadcast standard for HD radio, review of our broadcast ownership rules and universal service reform, just to name a few.

In short, from my new perspective at the FCC, America's communications future has never had so much potential. Consumers have never been more empowered. The marketplace is bursting with more brilliant entrepreneurial ideas than ever before and the FCC is working hard to create an environment where private enterprise can meet an ever more sophisticated consumer demand as quickly as possible. In so doing, we are promoting consumer freedom.

I look forward to meeting these challenges in partnership with Chairman Martin and my colleagues on the Commission, and I look forward to your continued direction, and your questions today and beyond. Thank you very much.

[The prepared statement of Mr. McDowell follows:]

STATEMENT OF ROBERT M. MCDOWELL

Good morning Mr. Chairman and distinguished members of the subcommittee. Thank you for providing us with this opportunity to appear before you this morning. After 16 years in the private sector, my first 9 months on the FCC have exceeded all of my expectations. I have been deeply honored to be able to serve the American people in this capacity, and with such talented and dedicated colleagues and staff.

Today is a wonderful time to be at the FCC. Revolutionary technological developments are yielding untold opportunities for newly empowered consumers to improve the quality of their lives. Similarly, new products and services are allowing businesses to improve their competitiveness and efficiency. This dynamic disruption transcends traditional regulatory paradigms. From the FCC's perspective, America's communications future has never looked brighter. Much work remains to be done, however.

REGULATORY PHILOSOPHY

From broadband availability, to the incredible proliferation of wireless technologies; from universal service, to localism and diversity in broadcasting; from wireless medical devices that improve thousands of lives each day, to the greatest entrepreneurial explosion in history known as the Internet: the issues addressed by the FCC touch the lives of every American. While advances in technology and competitiveness defy labeling under the regulatory stove pipes of old, I endeavor to approach each issue with a consistent regulatory philosophy; one that has served our nation well since its inception; one that trusts competitive free enterprise to serve the public interest the best.

Free markets and free ideas are the twin cornerstones upon which we built America. My approach to each issue that comes before the Commission is to focus on my

belief that the fundamental mission of the FCC is to promote freedom. I want consumers to have the freedom to have their demands satisfied. I want entrepreneurs to have the freedom to innovate and bring their products and services to market so they can satisfy those consumers' demands. Overall, I trust free people acting within free markets to make better decisions for themselves than those of us in government. Government should not adversely interfere with the relationships between consumers and entrepreneurs. Rather, government should try to remove barriers to entry and allow competition to flourish. I believe that the public interest is best served by following this approach.

There are circumstances, however, when the government should address market failure to further the public interest so new entrepreneurial ideas have a chance to compete in the marketplace and succeed or fail on their own merits—and their own merits alone. Any remedies applied to market failure should be narrowly-tailored, and sunsetted, to maximize freedom for all market players.

Today, disruptive new technologies pose challenges to existing providers of products and services—and to regulators and legislators. Part of the Commission's job is to help open new windows of opportunity to provide entrepreneurs new avenues for technologies to compete in the marketplace. Given this disruption, the FCC has to adapt and make a transition from legacy regulations that govern individual industries, to more nimble rules that ensure fair opportunities for all competitors. As regulators, we must be careful to avoid inhibiting innovation and technological advances. The FCC must continue to tear down barriers to entry and clear out unnecessary regulatory underbrush. Consumers, through the marketplace, rather than the Commission, should pick the winners. We should never lose sight of the fact that the ultimate shareholders in every endeavor we undertake are America's consumers.

As the Commission analyzes these regulatory questions, we of course are mindful that we operate within the parameters that you, Congress, have established for us. On every issue, I first look to the relevant statute to determine whether the Commission has the authority to take the action proposed or implement a new policy.

A Record of Accomplishments

The Commission is adopting policies to encourage increased broadband deployment for the public. While America's rate of broadband deployment has more than doubled during the Martin chairmanship (from 20 percent growth in penetration per year, to 40 percent growth last year, to a current growth rate of 52 percent), we are pressing hard for greater advancements. Accordingly, we are making it easier for entrepreneurs to construct new delivery platforms more quickly. Furthermore, our policies are paving the way for the owners of existing platforms to upgrade their facilities. The resulting new surge in capital investment will stimulate our economy and will give American consumers new tools to strengthen their freedom by enhancing their ability to choose.

In just my nine month tenure, the Commission has taken important steps to promote competition in a number of areas. I believe that our actions will foster the ability of American consumers and businesses—whether located in urban or rural areas—to have access to new, advanced delivery platforms.

Last summer, the Commission completed an auction for spectrum for Advanced Wireless Services (AWS) in the 1710–1755 and 2110–2155 MHz bands, which are ideal for the delivery of bandwidth-intensive wireless applications. This auction was phenomenally successful and brought in nearly $14 billion to the U.S. Treasury. The Commission's action to establish a broad array of market sizes for AWS licenses attracted participation by many types of entities. In fact, of the 104 winning bidders, 57 identified themselves as small or very small businesses, rural telephone companies, and businesses owned by members of minority groups or women. This represents 55 percent of all winning bidders. Wireless growth is rising rapidly due to robust competition and technological innovation. What was unimaginable just 10 years ago is now part of the daily routine of tens of millions of Americans. Innovative broadband services using advanced technologies allow customers to use new multimedia phones to watch TV, download songs, receive information and access content, such as sports, news and weather, at broadband speeds. I am committed to providing meaningful opportunities for entities of all sizes to bring their bold and innovative products and services into the dynamic wireless marketplace.

Over the last 13 years, since the Commission issued its first Wireless Competition Report, wireless subscriber growth has grown exponentially, and competition among numerous providers has flourished. The overall wireless penetration rate in our country is now at 71 percent. Furthermore, our report estimates that revenue per minute (RPM) declined 22 percent last year alone. RPM currently stands at $0.07, as compared with $0.47 in December 1994—a decline of 86 percent. (By the way, that 47 cents in 1994 would be 60 cents today when adjusted for inflation.)

While these positive trends benefit American consumers, I will continue to work to ensure that entities of varied types and sizes have meaningful opportunities to enter and thrive in the wireless marketplace. The Commission must ensure that our rules and policies pertaining to spectrum acquisition—whether at auction, through partitioning or disaggregation, or through spectrum leasing, for instance—are implemented and enforced in a manner that provides regulatory certainty and encourages market entry.

The Video Franchising Order the Commission issued earlier this month advances the pro-consumer goals of enhancing video competition and accelerating broadband deployment. The order strikes a careful balance between establishing a de-regulatory national framework to clear unnecessary regulations, while also preserving local control over local issues. It guards against localities making unreasonable demands of new entrants, while still allowing those same localities to be able to protect important local interests through meaningful negotiations with aspiring video service providers.

Many commenting parties, Members of Congress, and two of my distinguished colleagues have legitimately raised questions regarding the Commission's authority to implement many of these initiatives. I have raised similar questions. After additional study, I feel that we are on safe legal ground. The Commission has ample general and specific authority to interpret and implement section 621 and to issue these rules under several sections including, but not limited to, sections: 151, 154(i), 201, 303(r), 622, 706 and many others. Furthermore, a careful reading of applicable case law shows that the courts have consistently given the Commission broad discretion in this arena, including the authority to grant interim regulatory relief as we did with this order.

Although I would have liked to have provided the deregulatory benefits granted to new entrants to all video providers, be they incumbent cable providers, overbuilders or others, the record in this proceeding did not allow us to create a regulatory parity framework just yet. I am pleased that the Commission has committed to release an order addressing parity for all cable competitors no later than six months from the release date of the Video Franchising Order.

While we have worked hard to help foster the rollout of new delivery platforms, we have also endeavored to continue to make available to all Americans affordable telecommunications services. The Universal Service system has been instrumental in keeping Americans connected and improving their quality of life. However, this system is in dire need of comprehensive reform. In June 2006, we adopted interim changes to the Universal Service contribution methodology that were designed to help bridge the gap between the deteriorating status quo and a more sustainable Universal Service system of the future. The changes raised the interim wireless safe harbor and required VOIP providers to contribute to the Fund. By setting appropriate safe harbors and allowing wireless carriers and VOIP providers, in determining their USF contribution, the option of either using the safe harbor, utilizing traffic studies, or reporting actual interstate revenues, we provide the right balance of administrative ease and incentive to contribute based on actual interstate and international revenues. These interim measures also ensure that the Fund remains solvent for the near term and serve as an important first step toward broadening the Fund's contribution base to ensure equitable and nondiscriminatory support of the Fund in an increasingly digital world. In October, we also instituted a 2-year rural health care pilot program to determine the extent of the need for advanced services to meet the rural health care objective, pursuant to section 254(h)(2)(A) of the Communications Act, and how we can tailor the rural health care support mechanism toward that end.

Universal Service is intertwined with intercarrier compensation. We have to reform the current access regime; otherwise, it won't survive. I believe that all carriers should be compensated for the costs of carrying others' traffic on their networks. We have received comments on the "Missoula Plan" that was submitted by a NARUC Task Force last June. I look forward to reviewing those comments. We need to step back and see how competition and technology are changing the marketplace and examine where the current regime is in need of reform. We also need to promote efficiency, competition and technological innovation. It will be a long, cooperative process, but I look forward to working with all interested parties on this challenge.

FUTURE CHALLENGES

During this year in particular we have our work cut out for us. We are currently in the process of analyzing the record and finalizing the rules for the commercial portion of the 700 MHz spectrum band, which is well-suited for wireless broadband applications. The results of last summer's AWS auction, discussed above, provide

good guidance as we design the band plan and implement the rules for the 700 MHz auction. I hope to be able to enhance and improve upon the positive aspects of the AWS auction to provide a second meaningful opportunity for participation in the 700 MHz auction. Along these lines, I am pleased to consider a draft order that proposes to classify wireless broadband Internet access service as an information service, which would clarify any regulatory uncertainty with respect to wireless services, including those utilizing the 700 MHz band. Our comprehensive work in this area is especially time-sensitive given Congress's recent mandate that we commence auctioning the commercial 700 MHz spectrum no later than January 28, 2008, less than 1 year away. I am hopeful that we will complete our work this spring.

In addition, I am pleased that the Commission acted in December to seek public comment on a proposal for a national, centralized approach to maximize public safety access to interoperable, broadband spectrum in the 700 MHz band. I expect that this discussion will enhance the ongoing dialog regarding partnerships among the public safety community and the commercial wireless industry, which is important given Americans' high expectations for reliable communications and effective coordination among emergency personnel as they undertake day-to-day activities and in crisis situations. As Congress recently mandated that analog broadcasting cease in the 700 MHz band (including the 24 MHz of spectrum it reserved for public safety) no later than February 17, 2009, it is important that we complete our work in this proceeding as soon as possible.

We are also moving forward to create the opportunity for additional unlicensed operation in the "white spaces" of the TV broadcast bands. I am hopeful that our actions will foster a chain of events that will lead to an explosion of entrepreneurial brilliance toward creative uses for these bands. Mindful of our obligation to protect all users from harmful interference, our Office of Engineering & Technology is already working hard to analyze and test new devices and associated standards. Of course, the technology innovation spurred by the Commission's leadership in the white spaces proceeding plays a critical role in the wireless marketplace, including fostering job growth and related business opportunities. For this reason, I am hopeful that advances in technology and wireless service applications will facilitate entry of new and diverse players. Moreover, I am pleased that our timetable aims to ensure that new consumer equipment for these bands will be market-ready as soon as possible.

I am excited about our work to prepare for the 700 MHz auction, public safety's forthcoming access to the 700 MHz band, as well as future deployment in the white spaces, because I am hopeful that the competitive opportunities presented by these proceedings will broaden the ability of entities seeking to enter the wireless marketplace. I am committed to ensuring that the Commission takes advantage of additional opportunities to spur technological innovation and increased access to advanced wireless services by a broad array of participants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, whether licensed or unlicensed.

This year, we are also advancing our comprehensive review of the Commission's broadcast ownership rules and are busy building a record. As you know, these rules must strike a difficult balance. They must take into account the dramatic changes that have occurred in the media landscape in recent years and, at the same time, continue to promote our long-standing values of diversity, localism and competition. We must also carefully address the issues presented to us by the Third Circuit in the Prometheus decision. I hope we can develop a reasoned approach that resolves the regulatory uncertainty that followed the appeal of the order the Commission issued in June 2003.

I look forward to continuing our review of competition and the effects of consolidation among traditional media companies, as well as the emergence of new competing services. I also am eager to attend more field hearings around the country to learn more about competition, diversity and localism from the perspective of people with first-hand knowledge of the realities of their local market—be they consumers, broadcasters, programmers, artists, economists or academics. With respect to diversity, I am particularly concerned about the dearth of female and minority owners of broadcast properties. I anticipate learning more about the causes of this situation, especially as compared with other industries requiring similar amounts of capital investment.

Hopefully, the Commission soon will release rules in our digital audio broadcasting proceeding. I applaud the "early adopters" of in-band on-channel (IBOC) technology for taking the initiative and embracing the capabilities of digital radio, particularly multicasting, to provide their listeners with better quality sound and expanded programming options, particularly for underserved and niche audiences. I believe that the service rules and other licensing and operational requirements we

develop will provide both the regulatory certainty and the flexibility that the industry needs to expedite the transition to digital radio and to provide higher quality audio, diverse programming and innovative data services to the public.

I hope that the Commission will extend the de-regulatory benefits we are providing to new entrants in our recently adopted Video Franchising Order to all video providers, both incumbents and overbuilders. Many of the statutory provisions we interpreted in the video franchising proceeding are generally applicable to all cable operators. I want to ensure that no governmental entities, including those of us at the FCC, have any thumb on the scale to give a regulatory advantage to any competitor. Resolving these important questions soon will give much-needed regulatory certainty to all market players, spark investment, speed competition on its way, and make America a stronger player in the global economy.

Conclusion

In sum, from my new perspective at the FCC, America's communications future has never looked more promising. Consumers have never been more empowered or savvy. The marketplace is teeming with more brilliant entrepreneurial ideas than ever before. And the FCC is striving to create an environment where private enterprise can meet ever-more-sophisticated consumer demand as quickly as possible. In doing so, we are promoting consumer freedom.

I anticipate meeting these challenges in partnership with my colleagues on the Commission, and I look forward to your continued direction. Thank you.

Mr. MARKEY. Thank you, Commissioner McDowell, very much. That concludes opening statements of the Commission, and now we will turn to questions from the subcommittee members.

Mr. Chairman, you and I had an exchange of letters on the issue of the National Security Agency obtaining consumer phone records without legal process from certain phone companies. As you know, the Communications Act prohibits disclosure of phone records except with approval of the subscriber or as required by law; the Commission enforces this provision.

You wrote to me saying you would not open an investigation and cited court cases involving civil liberties groups and state secrets. An independent agency has its own duty to enforce its own governing statute. This NSA scandal is important to investigate, and communications laws are implicated. Mr. Chairman, are you now prepared to open an investigation? Have you reconsidered?

Mr. MARTIN. Mr. Chairman, as I have indicated back and forth in our correspondence and in our personal discussions on this, the Department of Justice in the United States Government has taken a consistent position that the investigation of the phone records are covered by their national security privileges, so that we would be unable to get the underlying information from the carriers without threatening that.

There have been several court cases that have ruled that these are covered by national security, including not only that were brought by private interest groups but by, for example, the Maine Public Utility Commission. One of the things is, and you and I, our personal discussions, we did discuss was confirming that the administration's position and the United States' position be the same in relation to the FCC, as well. And I have tried to confirm, in correspondence with the department, that that would be the same position if we had any investigations that were ongoing. And so as soon as I am able to confirm their response, I will provide that to you, as well.

Mr. MARKEY. So you have written a letter to the Justice Department?

Mr. MARTIN. Yes.

Mr. MARKEY. Will you give us the response to that letter when you get it?

Mr. MARTIN. Sure, of course.

Mr. MARKEY. Can we receive a copy of the letter which you have sent?

Mr. MARTIN. Of course.

Mr. MARKEY. I think we can predict the answer which you will receive from Attorney General Gonzales, but I think it is important that we have the Commission proceed in this dispute with the Justice Department. I think it is absolutely critical that the communications laws of the country be protected, and only at the point at which there is a legally obtained court order should the consumer information which is now being compromised be made available to the Justice Department, so I commend you for that move, and if Justice thwarts your efforts, we will, as a subcommittee, as a full committee, pursue that with the Justice Department.

Now, section 10 of the 1996 Act enables telecommunications carriers to petition the FCC to forbear from a regulation or a provision of the Act. If the FCC does not deny the petition within 15 months it is deemed to be granted. I have noticed that the FCC has been flooded with forbearance petitions over the last few years, primarily from the incumbents. Is the deluge of forbearance petitions draining FCC resources that could be spent establishing a broader FCC policy, such as broadband consumer protection, universal service reform and disability access, is that currently the practice that is occurring at the FCC, Mr. Martin?

Mr. MARTIN. We certainly have a significant number of forbearance petitions in front of the Commission. I mean, we have had them in the past before, but we have a significant number of them, as well, now.

Mr. MARKEY. So is that draining the resources that you have at the FCC to do other work?

Mr. MARTIN. I am not sure that I would characterize it as draining the resources of the Commission. I mean, I would say that certainly I think that it is preferable for the Commission to end up trying to address issues in the context of rulemakings whenever possible, so I mean I think that that is preferable, but the Communications Act is very clear that parties are entitled to file forbearance petitions and if so, that we end up having to address them and if we fail to, that they are deemed granted.

Mr. MARKEY. So if the forbearance petitions are not draining your resources, then why are the majority of the FCC's orders issued in response to industry-initiated actions like forbearance petitions and license transfers? It appears to me that the industry, not the FCC, is setting the FCC's agenda and determining how the FCC's resources are allocated.

Mr. MARTIN. I think that the Commission has ended up trying to address the issues that we think are the most critical going forward for a telecommunications infrastructure. I think we will continue to work hard to do that. We obviously try to and are required to respond to forbearance petitions and try to respond to license transfers in a very timely manner. Those are very important issues, too, for the industry, so we do end up responding to them, of course.

Mr. MARKEY. That is not the way we observe what is going on. Let me ask one final question. The FCC has an open rulemaking since 1999 that addresses the public interest obligations of TV broadcasting in a digital multicast environment. When will we see those rules?

Mr. MARTIN. Well, the Commission has already indicated that all of the rules that apply for the public interest obligations for analog broadcasting are applied to digital broadcasting. We have also extended the children's television obligations and clarified and extended those in additional broadcasting rules. We have an order before the Commission right now that is actually extending an enhanced disclosure requirement so that they would report more on the kind of coverage they are doing at the local level.

The remaining issues that are in front of us as a result of the comments that were filed in that original proceeding are actually asking the local broadcasters to commit to certain kinds of minimum content provisions like free over-the-air broadcasting.

Mr. MARKEY. So when will we see the resolution of that? When will we see the rule on the obligations of the broadcasters?

Mr. MARTIN. Well, I think we have addressed many of the rules that were part of that proceeding. In other words, we have addressed them in piecemeal rather than in one omnibus order. The one issue that is remaining is whether we are going to require minimum quantities of certain kinds of broadcasting. I am not convinced that that is necessary.

Mr. MARKEY. Well, will there be a conclusion to the 1999, this rulemaking that has been open since 1999, will that rulemaking be concluded this summer?

Mr. MARTIN. The 1999 proceeding wasn't a rulemaking. It was actually a notice of inquiry, so what we have done is start proposed rulemakings as a result of that, that address the different rules. That was actually only a notice of inquiry. We can do another report this year, if you would like, on the status of all of those, all of the issues, but we have had to address each individual rule in rulemakings. What we started in 1999 was just a general notice of inquiry, not a rulemaking.

Mr. MARKEY. That is 8 years ago. I just think it is important for this committee and the public to know what the obligation is going to be on the broadcasters in this digital era, and I would urge the Commission to resolve that this year. I turn to recognize the gentleman from Michigan, Mr. Upton.

Mr. UPTON. Thank you, Mr. Chairman. Chairman Martin, one of the big successes in the last 2 years was, of course, the enactment of the legislation moving from analog to digital that was included in the reconciliation bill in the last Congress. Where are we on the auction proceedings as it relates to the sale of the analog spectrum?

Mr. MARTIN. The legislation requires the Commission to commence the auction by the beginning of next year and then to deposit the proceeds into the Treasury by the middle of next year. The bureau staff is working very hard to try to put us in a position to start that auction even earlier. We would like to be in a position to start it sometime next fall to make sure that we conclude it in time to collect the monies and have it deposited by the statutory date.

Mr. UPTON. In addition to setting the firm date for the transition, the DTV legislation funded the Digital Converter Box Program. It gave public safety 24 MHz of spectrum and a billion dollars for an improved emergency communications system. It made 60 MHz of spectrum available for wireless broadband and probably will raise at least $10 billion for the Treasury. As you have heard about the Cyren Call and the Frontline proposals, should those proposals move forward, would that jeopardize your timetable for the auction?

Mr. MARTIN. The Cyren Call proposal would actually require legislative change. It would require Congress to decide not to go forward and auction all of the spectrum that we have been instructed to auction, so that would actually require legislation in order for us to not move forward. The Frontline proposal is a very recent proposal. We are still studying it. I don't believe it actually would require any changes in us being able to go forward. I am not sure that that actually does require any further changes.

Mr. UPTON. In 1999 the FCC granted deregulatory pricing flexibility for special access services when there was competition. Has anything changed with that regard? And I understand that there are a number of proceedings open on the special access issue. What is the status of those proceedings?

Mr. MARTIN. We have got several proceedings that were open. One was on applying what they call performance metrics to special access, making sure that the carriers who were selling special access to other competitors were doing so in a way the competitors could readily access those services. And as a result of the mergers that have gone through and the conditions that have been imposed, along with one of the forbearance petitions that we have addressed, all of the incumbents are already subject to the kinds of performance metrics that were the subject of that proceeding, so they are already subject to that because of conditions.

As a result, also, of some of those mergers, many of the incumbents are subject to certain kinds of price freezes on special access. In addition, we do still have an open proceeding of whether the Commission should re-impose direct price controls on special access, and that was opened in the beginning of 2005, and that is a proceeding that the Commission still has in front of it. We have got a record. There have been significant changes in the industry since then because of some of the transactions and mergers that have occurred, and I think, probably, what makes the most sense from the Commission's standpoint is to try to say what has been the impact of these changes in the industry into the underlying record in that proceeding.

Mr. UPTON. Do you have a guess as to when that might be concluded?

Mr. MARTIN. I mean, I think on the special access proceeding, I think the Commission either needs to conclude it based upon the record prior to the mergers or to seek further comment. I think at this time it would make more sense to seek further comment in the next few months, this summer, so that we can see what the changes are that have occurred because of the mergers last fall and the previous fall, how that impacted the special access issue.

Mr. UPTON. Now, I understand that Liberty has agreed to be subject to the same conditions as News Corporation after the sale of DirectTV. Some of those conditions may not easily transfer. How will the FCC approach the former News Corporation conditions as it examines the sale of DirectTV?

Mr. MARTIN. Well, one of the most important conditions that was imposed was making sure that News Corporation provided its regional sports, that it provided access to its regional sports networks to other video competitors. To the extent that, for example, that those regional sports networks are also being transferred to Liberty, then it would be important to make sure that those same kind of conditions were imposed.

Mr. UPTON. Last question that I have is, my time is expiring, is we talked a little bit earlier, Internet video applications such as YouTube and movie download services are an increasingly dramatic strain on the broadband networks. Broadband providers need not only to build bigger pipes, but also they need to build smarter pipes. Do you think that the broadband providers would make the investment necessary to respond to the increasing strain on the networks if they were subject to network neutrality requirements?

Mr. MARTIN. Well, I am certainly concerned that if we subjected them to network neutrality requirements it could be a deterrent, potentially, to some of their investment. I think we need to make sure we have appropriate balance, the importance of a content development with infrastructure deployment, and I think that at this stage we need to focus a lot on the infrastructure deployment incentives to make sure that we are providing for the opportunity for carriers to invest in the underlying networks and recoup those in the services that they are providing.

Mr. UPTON. Thank you very much.

Mr. MARKEY. Gentleman's time has expired. The gentleman from Pennsylvania, Mr. Doyle.

Mr. DOYLE. Thank you. Chairman Martin, you were a Commissioner in 2001 when the FCC announced that Mr. Dale Hatfield was to write a report on enhanced 911 services, and you were there when the Commission opened the docket for public comment in March 2002, and you were still there when Mr. Hatfield filed his completed report in October 2002. In fact, in April 2003 you gave a speech to the FCC's 911 Coordination Initiative where you said that Mr. Hatfield's first report on the enhanced 911 issue "contains a number of important insights" and that you "strongly agree that an unusually high degree of coordination and cooperation among all stakeholders, both public and private, will be required."

In other speeches, you have said that "the importance of E–911 becomes more clear every day. The ability to track the location of a 911 caller is vitally important. Too many lives are at stake." So 911 and E–911 have been an important priority for you, is that correct?

Mr. MARTIN. That is correct.

Mr. DOYLE. Mr. Chairman, in 2005 you had been the chairman since March, that is correct?

Mr. MARTIN. That is correct.

Mr. DOYLE. And I understand your agency contracted with Mr. Hatfield to write a follow-up report around the fall of 2005, is that correct?

Mr. MARTIN. He was on contract from 2000 on, and it was renewed periodically. In September, the bureau did extend that contract again in 2005. I think that actually his request that he do an updated report had been in 2004, but yes, it was again extended in 2005.

Mr. DOYLE. In contrast to the first report, the agency didn't publicly announce that Mr. Hatfield had been retained by the Commission to conduct the second follow-up report. Your answer is you just extended his first report, that is why it wasn't——

Mr. MARTIN. We extended his contract. He actually remained on contract every year.

Mr. DOYLE. But you did ask him to write a follow-up report?

Mr. MARTIN. I think that that was actually done in 2004, but yes, there was a request that he try to work on a follow-up report and continue to provide expertise.

Mr. DOYLE. Thank you. Mr. Hatfield reported his tentative findings to the Commission staff around the spring of 2006, and then afterwards, it is my understanding your staff followed up on the matter, and around that time, Mr. Hatfield was told to cease his work and submit for his payment. Let me share with you, and I am going to paraphrase here, what I understand to be some of the tentative conclusions of that follow-up report.

First, that there is a strong need for a uniform method of testing 911 location accuracy. Second, that the FCC take greater steps to address the problem of in-building accuracy, of in-building location. And third, that the Commission do more to solve the rural 911 location problem. And I want to say that again, do more to solve the rural 911 location problem, and that is critical, because in rural areas without overlapping cell phone towers, this is a critical thing that needs to be addressed, and I don't think it can be denied that these are critical issues for the public safety.

Commissioner Copps, let me ask you, were you aware of this follow-up report that Mr. Hatfield was asked to do and the fact that the report was cancelled before it was written in its final form?

Mr. COPPS. No, sir, I was not aware of the report and only know about the developments basically through the news media.

Mr. DOYLE. Thank you. Do you think some of the conclusions which I have just read in the report are important conclusions were there a further study by the Commission?

Mr. COPPS. I think so. I think if an engineer with the credibility of Mr. Hatfield makes a suggestion, as you say he did, that maybe we need to be looking at the capabilities of wireless in buildings and the efficacy that, yes, that is important. We are talking about the safety of human beings here.

Mr. DOYLE. How about you, Commissioner Adelstein?

Mr. ADELSTEIN. I would agree. I think that Dale Hatfield is one of the best we have ever had. He was our chief technology officer. His initial study was a seminal study that guided our efforts on E–911 for many years. I think it is always helpful if these key factors are weighed. I think all of the issues that he raised in his study

are very important. I think that study would be helpful to be made public for the benefit of Congress and the public, as well as us.

Mr. DOYLE. Commissioner Tate, were you aware of this study?

Ms. TATE. No, sir, I was not.

Mr. DOYLE. Do you think the conclusions reached by Mr. Hatfield could have been valuable to the Commission?

Ms. TATE. It sounds like they could have. I haven't had the opportunity to see the report.

Mr. DOYLE. Mr. McDowell?

Mr. MCDOWELL. Me, as well, sir.

Mr. DOYLE. Now, Chairman Martin, I want to point out that Mr. Hatfield gathered information by interviewing people, and since folks universally thought his first report moved the Commission and stakeholders in productive ways, they were looking forward to this follow-up report. Now, in today's newspaper, when you talked to, or your spokesman spoke to the USA Today, it seems to me that if I am quoting Tamara Lipper correctly, she said that you were simply trying to save the taxpayers money by not having the report come to conclusion. Now, the report cost, Mr. Hatfield was paid $9,500, I understand, to get to the point where he got, and I am not sure how much more it would have cost to put the report in writing, maybe a couple more thousand dollars. In a budget of over $330 million, sir, is that really the reason you told him to stop the report?

Mr. MARTIN. I think that it is important to understand that in this instance, actually, we had paid Dale Hatfield over $10,000 in 2004 to do an updated version of the report. We had actually paid him, the contract in 2005 was for an additional $10,000 to do an updated report. He never presented any of the initial findings to us, and indeed, when I found out about the contract, which I wasn't aware of until the spring of 2006, we actually asked him could he provide us a summary of his findings and where he was going on his report, which he declined to provide to any of us. As a result of his declining to provide any of the information of what he was doing, I didn't think it was important to renew the contract and continue to pay him anymore for that money. We have never seen the report, and if you have a copy or if anybody has a copy, we would love to see it.

Mr. DOYLE. You are telling this committee, and I want you to choose your words carefully, you are telling this committee that Mr. Hatfield did not sit with committee staff and go over his preliminary findings and that he did not sit with Mr. Campbell of your staff and go over these findings?

Mr. MARTIN. No. Yesterday, according to press accounts, Dale Hatfield presented something to the bureau staff, but I was unaware of it and so was Mr. Campbell on my staff, and indeed, Fred Campbell, on my staff, called him when we found out about the contract and said could you provide us a copy of your report, and a copy of your tentative findings, and he said no. So the bottom line is we paid him for his contract, and if he has a report, we would welcome it. We would welcome it. There has been no chairman who has been any stronger on the importance of providing 911 to——

Mr. DOYLE. Isn't it true that Mr. Campbell told Mr. Hatfield not to finish the report, to stop his work where it was and to submit his bill? Are you saying that is not true?

Mr. MARTIN. No. We said to submit his bill, and that we weren't going to continue to pay him anymore for it. We had paid him for 2 years, and we had no report. But he is more than welcome to provide the report if he would like to.

Mr. DOYLE. Isn't that the same as terminating his contract? Why wouldn't you demand a report? Why would you pay someone $10,000 and then not demand a report?

Mr. MARTIN. We would be happy to have his report if he wants to provide it and if he provides it to us, we will be happy to provide it to the committee, but we weren't going to renew his contract again and pay him again for the third time when we still didn't have a report.

Mr. DOYLE. Mr. Chairman, do you think the conclusions that he reached in the report are important for the Commission to act on?

Mr. MARTIN. I think that the conclusions are ones that not only do I think they are important for the Commission, we already had the Commission working on it. We established a Homeland Security Bureau to work on these very issues, and indeed, the conclusion that is in the newspaper today that says 60 percent of the time people are using wireless phones inside buildings is readily available from J.D. Power and Associates, on Google's Web site, which I searched this morning——

Mr. DOYLE. If the Commission was already working on these issues, sir, then why did you ask this gentleman to do a follow-up report?

Mr. MARTIN. I didn't ask him to.

Mr. DOYLE. Who did, Mr. Chairman?

Mr. MARTIN. Chairman Powell did in 2004.

Mr. DOYLE. And you weren't aware of this?

Mr. MARTIN. No, I wasn't.

Mr. DOYLE. So you don't know what your bureaus are doing when they let contracts out?

Mr. MARTIN. In 2004 I was a commissioner, not the chairman. In 2005 they renewed it, and I didn't know about it, no. And then when I did become aware of it in 2006, I said that he is more than welcome, as I said, to present the report to us. Mr. Hatfield is obviously an esteemed public servant. He spent many years on the Commission, and we would welcome him to provide us his assistance, but I did not think it was necessary to continue to pay an outside contractor who, by the way, is also a contractor to many of the entities that lobby us, to continue to provide technical support when I think we have the technical expertise to be addressing these very issues. And indeed, I think it is important that we end up moving forward on these issues, and we are.

Mr. DOYLE. I see my time is up, Mr. Chairman.

Mr. MARKEY. Gentleman's has expired. The gentleman from Mississippi, Mr. Pickering.

Mr. PICKERING. Mr. Chairman, thank you. To all the Commissioners, I am grateful for your service and for your presence this morning. As we look at where we are today in the post-implementation era of the 1996 Act and at the same time, after most, I be-

lieve, mergers have occurred and so the concentration and the transition to all-digital and mostly IP-based services and applications, it is very important that we get the balance and the decisions and the policies right as we go forward in a period of convergence and hopefully continue the competition.

My questions are going to try to address those things that I think will maintain healthy competition as we go forward. But the first question that I have for the Commissioners deals with something that Congresswoman Harman brought up and that is the interoperability as it relates to emergency services.

As we in Mississippi and in the Gulf region discovered after Katrina, interoperability is a critical, vital service and after 9/11, it was one of the key findings that we needed to implement. I hope to work with this committee to introduce legislation that would set up a process for the industry and the emergency response community to come up voluntarily with an interoperability standard. But if there is failure to do so by a date certain, I would then hope to ascertain with the FCC to have an FCC proceeding to do it on a mandatory basis, if there is a failure to do it on a voluntary basis.

Chairman Martin, is that, in your view, an appropriate way to achieve interoperability standards that we have yet to realize or achieve since 9/11 and after the Katrina experience and lessons from that storm?

Mr. MARTIN. I think it is appropriate. I think that it is always preferable for the industry to try to find a way to address technical issues like interoperability through their own standard setting without the Government mandating a particular standard. However, this issue is too critical to allow for that to go unresolved over an extended period of time, so at some point if there is an inability to reach a common interoperability standard, I think it would be appropriate at some point for the Government to go in and say that we will mandate one because the industries are unable to come together on their own.

Mr. PICKERING. Commissioners Copps and Adelstein, would you agree with that approach, as well?

Mr. COPPS. Yes, I think you have hit the nail on the head with regard to that. My only addition to that would be it has been 5 years since 9/11. We still don't have the interoperability. We have had a lot of public sector/private sector dialog and talk about voluntary guidelines and voluntary standards. We don't really have the assessment to what extent they have been implemented by going around and talking to first responders around the country. I know it is not very wide so yes, getting this done is top priority.

Mr. ADELSTEIN. I certainly agree. I think it is an ongoing challenge for the Nation. It is critical that we promote widespread large-scale interoperability. The FCC has tried to push interoperability through general allocation, but the public safety spectrum is in different bands and always funding issues have presented themselves. I think technology is one of the keys to solving the problem. The national 700 MHz broadband solution is one way that we could possibly work to find some creative solutions to this.

Mr. PICKERING. Thank you. I look forward to working with you all to achieve those objectives. The next issue, in Communications Daily yesterday, reports that the FCC is looking to reinstate a 30

percent cap on cable ownership. As we just completed the largest mergers in telecommunications history, AT&T and Verizon, and as you look at broadcast ownership, shouldn't there be some type of ownership parity between the different platforms? And does it make sense to cap cable at 30 percent when you have Verizon and AT&T and in the broadcast area no real equivalent of those types of caps on ownership so the different platforms, as they converge, can compete fairly and effectively? Do those caps make sense in today's world?

Mr. MARTIN. Well, first I think it is important to understand that the cap actually applies to both the cable companies and the telephone companies to the extent that they are providing video services. So it already does apply to each platform as they converge, so that cap is not a cap on cable companies, it is a cap on providers of multi-channel video services, so it would apply to the telephone companies, as well.

And then the second thing is that Congress actually instructed the Commission to adopt a cap on video ownership throughout the country, in part because of the concern that if there was one provider of video services at the retail end, they actually might have a monopoly power on the buying of content, and that same issue doesn't arise in the context of telecommunications. But again, it is important to understand that this cap would apply to the telephone companies, as well.

Mr. PICKERING. But only as it applies on video, is that correct?

Mr. MARTIN. That is correct. It will apply to any of the video providers, but it would apply to telephone companies when they are providing video services, as well.

Mr. PICKERING. But on the video side, we don't expect the Bell companies to be able to get anywhere close to 30 percent in the near future, would we?

Mr. MARTIN. I don't know. We will leave it up to the marketplace and see how they end up, what kind of progress they end up making, but what is important is that the reasons for the cap and also that Congress instructed the Commission to establish a cap were in part because of the concerns about the buying power of video content, which isn't present for Internet services because in that sense, the pipe is open so that anybody can go get whatever content they want.

Mr. PICKERING. On the 700 MHz, Mr. Chairman, what do you see as the timetable for moving forward on that auction on the rulemaking that would adopt the specifications for the 700 MHz auction, and what is your view on the size of the auction in varying markets?

Mr. MARTIN. What we hear from parties is they are trying to have at least 6 months from when we adopt the final rules for the size of the markets to when we actually conduct the auction. It is helpful for them to be able to finalize and establish their credit to be able to participate in the auction. So for one, trying to participate in the auction sometime this fall, that would mean we want to have the rules in place 6 months before, which would be about April or May of this year we would like to be getting those in place.

I am hopeful that we will be able to do it, actually, at the April meeting. I think it is actually critical that we continue to try to es-

tablish smaller and small geographic areas when we are auctioning off spectrum to make sure that smaller entities are able to participate vibrantly in the auction and also that we can make sure that people are buying spectrum in geographic areas that they will actually utilize so that we can make sure in rural areas it is getting built out.

And then finally, I think and there has been increasing discussions about whether we should reconsider some kind of policies to make sure that people are actually building out and utilizing the spectrum that they are purchasing in geographic areas. There are various proposals like use it or lose it, or actually build out requirements, but I think we have got to make sure that rural areas, this spectrum is going to be incredibly valuable for the deployment of broadband infrastructure, and we have got to make sure that people that are participating in this auction have every intention of actually building it out and utilizing it to serve those in rural areas. And so I think we have got to do it on small bases and have strong build-out requirements.

Mr. PICKERING. One last question. Commissioner McDowell, your recusal policy ends when this year?

Mr. MCDOWELL. According to my ethics agreement with the Office of Government Ethics, it is a 1-year ban.

Mr. PICKERING. And that 1 year expires at what time?

Mr. MCDOWELL. June 1 of this year.

Mr. PICKERING. June 1. And at that point, would you be engaged in all proceedings and involved in all proceedings at the FCC?

Mr. MCDOWELL. To this point, Congressman, of course I have not actually cast a vote in such things as forbearance proceedings or matters involving specific parties. I will consult with my ethics agreement, the Office of General Counsel and the Office of Government Ethics as we go forward, but I anticipate being able to participate in more proceedings.

Mr. PICKERING. In your response to Senate questions, did you indicate that you would be available for all proceedings?

Mr. MCDOWELL. Ultimately, yes.

Mr. PICKERING. By June?

Mr. MCDOWELL. That was not specifically addressed. In all honesty, the footnote to Mr. Feder's memo of December 8 speaks to the appearance of a conflict issue perhaps lasting beyond June 1, and so these are questions we still need to resolve beyond that.

Mr. PICKERING. We all need you to be involved in all proceedings.

Mr. MCDOWELL. I would love to be involved with all of them, believe me.

Mr. PICKERING. Thank you.

Mr. MARKEY. OK, the gentleman's time has expired. The gentlelady from California, Ms. Harman.

Ms. HARMAN. Thank you, Mr. Chairman, and thank you, too, all of you, for your testimony. I hope we don't wait another 4 years. I would suggest, Mr. Chairman, that we have regular, ongoing conversations with our FCC Commissioners, not all of them in a formal hearing setting. I think it would be useful to have informal meetings, as well. I know I personally have had informal meetings recently with four out of five of the Commissioners, and I look forward to getting to know Commissioner Tate.

I want to go back to the issue I raised in my opening statement and the issue that has been raised by Mr. Upton and Mr. Pickering and that is the critical importance of making sure that the DTV transition goes forward so that we make available 24 MHz of spectrum in the 700 range for public safety communications. All of you have said that this is important. I just want to underscore the fact that it is on your watch. You won't be able to say that a prior chairman didn't do it, did do it, did something else. This is on your watch, and the clock is ticking. As Mr. Pickering said, Katrina was an embarrassment, especially since it came many years after 9/11, and we should have fixed the problem. I am not blaming this on you, but I am saying you are a central part of the solution. Does anyone disagree with that? No. You have issued numerous notices of proposed rulemaking. You were way into this. There was a very helpful, at least to me, op-ed in the March 13 Wall Street Journal called, "Failure to Communicate," and Mr. Chairman, I would ask unanimous consent to put this in the record. It is by Jerry Brito.

Mr. MARKEY. Without objection.

Ms. HARMAN. Thank you. What that op-ed points out is that, and I am quoting, "Responders often cannot communicate with each other because the Federal Government assigns to each of the 50,000 public safety agencies in the country," that is every hometown fire and police department, "their own radio license and piece of the spectrum with which to build out a communications system." They point out that this affords great flexibility but that it comes at a cost, which is that more often than not, systems can't talk to each other. Anyone disagree with this? No.

So we need to figure out a plan, and you are a critical part of this, to move police and fire and emergency prevention services to something that makes sense in the 21st century. Anyone disagree with that? No. OK. My question then, is, in my 2 minutes, how it is, with some specificity, that you are going to make a decision about things like whether you split that 24 MHz band in half, which is one of the things you are considering; whether you embrace some of these new ideas by Cyren Call and Frontline Wireless, which, as you said, you need to learn more about.

What it is that we do, what it is that you do, as experts in charge of who gets licenses, to drive our earnest first responders to technologies that obviously fit much better the requirements of catastrophic attacks that we can expect or catastrophic natural disasters in the 21st century? Anyone is invited to comment.

Mr. MARTIN. Sure. I think that there are a few options in trying to address the interoperability issue. I think that one is obviously this Cyren Call proposal that has been put forth. Again, as I reiterated earlier, that would really be up to Congress to decide whether to take away some of the spectrum that is being utilized for commercial auctions and provide it to public safety. We have put forth a proposal that would actually establish a national licensee by a non-profit that would be able to, then it would be license holder, and it could ensure interoperability among all these different public safety communities.

Ms. HARMAN. And if I could just interrupt, do you think there is enough spectrum for that licensee to accomplish that task?

Mr. MARTIN. I think there would be enough for them to at least be able to provide some basic broadband connectivity and then use that broadband connectivity as a platform that could then address the interoperability issues. It won't fix all of the radios that have already been bought that are not interoperable, but it would provide a piece of spectrum that could be utilized for broadband and IP technologies that then could be an area where people could communicate, but it won't fix all of the radios they have already bought.

Ms. HARMAN. Does anyone else have a comment? I know my time is up, Mr. Chairman. I just wanted to invite comment to my statement on the need for this.

Mr. COPPS. Well, I think we have a number of things. We have to make sure the 800 MHz transition is working as it was intended to work. In addition, all of these decisions that we originally needed on the 700 and we really have to know exactly where we are and you asked an interesting question about the available public safety spectrum and we all have kind of an intuitive reaction to that, but what we really need to have is a really good inventory of exactly what is being used and how extensively it is being used and understand the problem before getting to the solution.

Ms. HARMAN. Thank you, Mr. Chairman. I just hope we don't keep learning forever. I think we need to find a solution very quickly and we are going to be 4 years later than Congress promised, so let us get it right. Thank you.

Mr. MARKEY. The gentlelady's time has expired. The gentleman from Oregon, Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman. Appreciate that. I have a question involving the Universal Service Fund and all and I guess part of it, it is my understanding that the FCC designation of carriers eligible to receive Federal high-cost support has perhaps ignored some applications for a number of years. It seems like the companies deserve some sort of timely response, whether they are approved or denied. And I am curious if you can explain why some of these applications have been pending for a considerable length of time and why?

Mr. MARTIN. The Commission is facing a significant financial problem with the number of CETCs that are receiving Universal Service money. When I arrived at the Commission, the first year we gave out $1 million to eligible telecommunications carriers. Last year we gave out $1 billion during my time at the Commission. So you have seen a dramatic increase. We estimate that under the current timeline, with no further applications being granted, we will give out somewhere between $1.3 and $1.4 billion this year.

If we grant all the pending applications, some estimates are that could be as high as $1.7 billion this year. The Commission is facing a significant crisis in this area. The Universal Service joint board, which is composed of State commissioners and Federal commissioners and also a State consumer representative, are considering before it various proposals, including a proposal to cap the CETC fund right now. They anticipate that they are going to make a recommendation to the full Commission sometime within the next 4 to 6 weeks.

And I think it is critical for us to see what that recommendation is with the kind of growth that we are seeing, we should see what that recommendation is before we further exacerbate the problem. To the extent that we are not going to take any kind of steps to address this issue, then you are right. We would need to grant all the applications and address it from a financial standpoint, but I think it is incumbent upon us, because we have this significant financial problem, to make sure we are moving very guardedly to try to protect the fund, as it is. And I think that waiting to see what the board's recommendation is, is important. When we see that kind of growth in a Government subsidized program in a very, very short period of time, I think we have a potential of having a real problem.

Mr. WALDEN. I spoke with a number of people about a different issue, that involving white spaces, over the last few weeks, and I am just curious, from your perspective, as Commissioners, your views on white spaces and whether or not the technologies that are emerging, I know they have just presented you with some new equipment, literally, to be investigated, if there are concerns about interference or not. My understanding, too, is you have come to the conclusion, Mr. Chairman, that auctioning off this white space spectrum probably wouldn't make a lot of sense. Is that correct?

Mr. MARTIN. That is right. In general, I think that this spectrum, the people utilizing the white spaces would not be the primary users of the broadcast spectrum, and when you are a secondary user, that is not usually the typical kind of license we auction off. Usually, it is someone who is the primary user and has very defined rights. And in this instance, we would be actually auctioning off the right to use it on a secondary basis and not interfere with the primary broadcasters, and that is more typically what we do on an unlicensed basis.

We are concerned about making sure they don't have interference with the underlying broadcasters, and I think it is critical, particularly when we are going through the DTV transition, that we make sure we don't allow for there to be any ongoing interference with those broadcasters in that context. And the technologies have improved such that communications devices are actually able to incorporate sufficient technical capabilities, and actually listen in a geographic area before they speak, and then they could listen, as a broadcaster here, on channel 3 or channel 5, and if there is, then don't operate on that channel.

That is what the device that was just delivered to our engineering lab this week says that they have developed that kind of a technical capability so that they will be able to make sure they are not interfering in each market and take that same device from market to market and have it not interfere. And to the extent that it truly does work that way, then this will be a good breakthrough to be able to utilize that white space.

Mr. WALDEN. All right. Let me shift gears to an issue that I know all of you are concerned about, and so are we, and that is broadcast media ownership and various proposals, not only in broadcast but elsewhere across the spectrum and including, I understand, a recent submission to go to a 30 percent cap on cable.

I would be curious to know why you think that proposal would withstand court scrutiny when the prior one did not.

But moreover, I know we allow duopolies in major markets for television and yet I know in a district like mine, that is very rural, it is actually some of the small or medium sized markets where the broadcasters are struggling in deep competition for advertising dollars locally with cable and in some cases, radio. Their ad rates aren't much different and yet their costs are higher and I am just wondering why we allow duopolies in major TV markets but not in the smaller and medium markets.

Mr. MARTIN. The Commission has always tried to find a balance between making sure that the broadcast companies are able to make sure they are making enough money to stay in business and continue to gather local news and at the same time, that we are preserving the diversity of viewpoints and voices in each market. And obviously, when there is a larger market and there is more broadcast stations that are available, there is less of a concern about making sure that we preserve the diversity of those. In the smaller markets, it is more difficult to make sure that there are enough different voices out there.

And I think that that creates a natural tension because in many areas, in many small markets, that is actually where some kind of increased consolidation is critical and that is why we are finding this appropriate balance of how we make sure and preserve the local voices that we have got and that they have enough financial wherewithal to continue to gather news while at the same time we preserve the maximum number of voices in that market that we can. But it is ironic that yes, in areas that are smaller, there are fewer voices, but that may also be the area where they are under the most financial constraints.

Mr. WALDEN. I would concur.

Mr. COPPS. Can I make a comment there?

Mr. WALDEN. Sure.

Mr. COPPS. Much of the debate that we have had is whether you look at this problem just holistically or individually. So you pass, as Chairman Powell wanted to pass and did pass through the Commission, a law that just grants duopolies a green light, no questions asked and I think that is a bad idea. A duopoly, especially in the multicast era, does have tremendous power if it has got 12 streams of broadcast into a small locality like that.

But we should have the ability, and I think we do, to look at these things on a granular basis and I have never said, for example, that I am against all consolidation and I have seen areas where maybe an area would be deprived of service without it, but you have to do that, make that public interest finding on an individual basis, rather than just flash some green light to every combination that the mind of man or woman can devise.

Mr. WALDEN. I understand that and I don't think any of us is advocating that, but I usually disclaim here, as the only licensee in the Congress, I have also seen the benefit of consolidation, what you are able to do then to enhance programming opportunities in small radio markets, which is what I am familiar with. And I see that Clear Channel sometimes gets beat up as being this giant radio holding company and yet I think they are less than 10 per-

cent of overall radio station ownership by stations and are actually shedding 400 of their radio stations and 40-some of their TV, so you see a sort of realignment going on out in the market to the other competition that is out there. So my time is expired, Mr. Chairman. Thank you, and I want to thank the Commission.

Mr. MARKEY. The gentleman's time has expired. If I may, at this point, recognize the gentleman from Texas, the ranking member of the full committee, Mr. Barton. When I recognize two Democrats over here in order to—so let me turn and recognize the gentleman from Texas.

Mr. BARTON. Mr. Chairman, I thank you for your courtesy, but I think I am the last person to arrive today. I would wait my normal turn because I am very late, and I appreciate your courtesy.

Mr. MARKEY. I don't even think I would have to say, without objection, to have you recognized out of order. I don't think there would even be a thought, but I thank the gentleman. I will turn and recognize the gentleman from Indiana, Mr. Hill.

Mr. HILL. Thank you, Mr. Chairman, and thank you, Chairman Martin and the Commission members for attending today. I live in a town of 18,000 people. It is the home of John Mellencamp, the rock star, and the originator of that song, Small Town. My point is I live in a rural area and healthcare is one of my top concerns. I am aware that you recently announced a new $60 million rural healthcare pilot program as part of the Federal Universal Service Fund. I am very interested in this program, and I want to learn more about whether telemedicine programs in Indiana can expect to receive funds from this new program and on what basis.

I understand, from people in the rural telemedicine community, that a staff person from the Commission recently spoke at a Capitol Hill conference, and when he was asked how the FCC will determine who gets the pilot program grants, he replied that the FCC will be using the Goldilocks Rule, meaning whichever application feels just right. I think this statement has caused a lot of confusion. This is an important opportunity for my constituents, so I would like for you to clarify what that staffer meant by the Goldilocks Rule.

Mr. MARTIN. I am not sure what they meant by the Goldilocks Rule, and so I don't know what they meant. What I can say is that the Commission has a rural healthcare program that we have never fully utilized, that we have about $400 million a year that we set aside for rural healthcare programs, and we have never utilized more than about 25 percent of it in any particular year.

One of the things that I discovered in investigating this when I became chairman is that many of the rural healthcare, the rural programs, were not applying for additional funding, in part because they needed to be able to aggregate to apply for programs on a regional or at least a statewide basis for a network. And the same thing we saw in a lot of the Universal Service Schools and Libraries Program, that individual schools were having a hard time applying for money, but if we let school districts and/or States apply, it actually helped facilitate money getting out to them.

So what we have done in the pilot program is allow for rural healthcare programs, the rural healthcare applicants, to apply on a regional network basis and also be able to fund a more signifi-

cant amount of the money that would be used to deploy an infrastructure to cover a statewide network or a regional network and in some cases, it could even cross State lines.

And I think that that is going to allow these consortiums to be put together to serve more of the rural healthcare needs in those local rural small communities. And I think that we actually wanted to encourage as many people to apply as possible because this has been an under-utilized fund. We do have a certain amount of a cap on the program of how much we can end up spending any particular year, so I think it will be difficult, and the Commission actually debated this last fall about how are we going to determine among the applicants that we get.

And I think it was something that was a significant amount of debate last fall when we opened this program, we decided that it was more critical that we make sure and get the program up and going on a trial basis and do our best to judge which programs seem like the most likely to succeed. And we also thought we would try to make sure we picked them in several different geographic areas so they wouldn't all be in the same area of the country.

Mr. HILL. But you are not going to be making decisions based upon if it just feels right, then, is what I hear you saying?

Mr. MARTIN. No.

Mr. HILL. OK. I have three questions I want to ask. I am assuming that all five Commissioners will have the opportunity to vote on the recipients for these grants?

Mr. MARTIN. That is right.

Mr. HILL. OK. Second, given that there is a great demand for this program in determining the recipients of the award, I assume you will be relying on telemedicine experts and the assistance of the national telemedicine organizations to peer review the applications before selections are made?

Mr. MARTIN. I am not sure that we have proposed putting them out for peer review to outside consultants. We can consider that. The applications haven't even come in yet.

Mr. HILL. OK. But so you are not considering this at all?

Mr. MARTIN. I don't think anybody had suggested that to us. This is a suggestion that we will take back and consider whether there is enough time to do that, but I think that might be a helpful suggestion.

Mr. HILL. I hope that you will keep this in mind as you go through the selection process, and I think this can be a very helpful, useful tool for you, especially for rural areas like mine.

Mr. MARTIN. Sure.

Mr. HILL. OK. Third, in many grant programs, the selection criteria are weighed to allow for objectivity and transparency in awarding of the grants. Will the Commission be releasing the selection criteria analysis for each of the winning awards in the first year so that applicants for the second year will better understand the program's requirements?

Mr. MARTIN. Sure. And ultimately, what we are hoping to do with this pilot program is be able to get it established so that we can extend it to everyone who applies after that.

Mr. HILL. OK. I yield back the remainder of my time.

Mr. MARKEY. Gentleman's time has expired. Chair recognizes the gentleman from Nebraska, Mr. Terry.

Mr. TERRY. Mr. Chairman, I appreciate all of you coming up here today and engaging in discussions about our areas of interest that overlap your authority. One of mine is reforming the Universal Service Fund and using that as a tool, then, for ubiquitous broadband roll-out within the rural areas. It seems logical to me to, instead of us up here trying to recreate the wheel, a new program or tax credit program or whatever, we use what is already in existence, already has an infrastructure within the FCC, not only the telephone infrastructure, telecommunications infrastructure already existing in rural America, but also the dollars.

And it seems to me that by reforming and in essence, loosening up Universal Service and keeping the dollars at the same, that we can meet our goals that I think several of you stated during your opening statements about having ubiquitous roll-out of broadband throughout America so that all Americans have access to it. We will define access in a minute. But I just wanted to ask a survey of sorts, of the Commission, starting with Mr. Adelstein, about your individual opinion about whether Universal Service is relevant today and whether or not it could be used as a tool to help speed up rollout of broadband throughout rural America.

Mr. ADELSTEIN. I think Universal Service absolutely can be critical to the rollout of broadband in rural America. Currently, it is under our policy, no barriers. A lot of companies are using Universal Service support to develop systems that are capable of broadband, but broadband isn't a supported service, directly. I think it is only a matter of time before that happens. It is going to be sooner rather than later because voice is increasingly becoming just one application over broadband pipes. It doesn't make sense just to subsidize one application.

What we need to do is subsidize those pipes to make sure that they are every bit as thick in rural parts of the country as in the rest of the country, and we do need to bring costs under control in certain aspects in order to move towards this system, but Congress clearly envisioned that, in the 1996 Act, that we would move towards advanced services. It is mentioned five times in section 254 of the Act, and I think we need to take that into account, as a commission.

Mr. TERRY. Mr. Copps.

Mr. COPPS. Clearly, broadband could be and should be part of the Universal Service Fund. This is the central infrastructure challenge by time, getting this out, so we need to have that strategy, and we need to have that commitment. We have to have broadband, then, not just benefiting from the fund but contributing to the fund and increasing the base of the fund. It is not by now, and the Commission has gone in the wrong direction with regard to that. It still leaves the fund with considerable pressure on it, as you know, so I think another thing that needs to be considered at some point is extending the contributions from intrastate calls to the Universal Service Fund. I think if we had broadband in intrastate, we made an effort to true up wireless and VOIP, that should be most of the way there to putting the fund on a reasonably sound basis.

Mr. TERRY. Very good.

Mr. MARTIN. I think that it is important to try to figure out a way to utilize Universal Service monies for broadband infrastructure. Indeed, Commissioner Copps and I, when we were on the joint board in 2002 and 2003, when the joint board considered this and didn't actually consider or allow it to be more directly utilized for Universal Service broadband support. But we do face a crisis, as I talked about, on the financial side today. Currently we anticipate that the contribution rate is going to rise, continue to rise directly just in supporting current voice services.

One of the reasons why I think we need to move to what I call our reverse auctions methodology in distributing money is that we would be able to say we are going to increase the level of service that we are going to provide to a particular area, but we are not going to provide for duplicative networks to be built to provide just voice services. Right now, today, we use Universal Service funds to support multiple networks providing only voice grade services. Instead, what I think we should be doing is providing Universal Service support for one carrier of last resort in an area, but that one carrier of last resort, we should begin ratcheting up what we expect them to provide to its customers, including broadband capability.

I think that the only way we are going to be able to do that and cap the money where we are now, which I think was also one of the things you said in the premise of your question, how we keep the money the same, is we have got to start saying we want more for the money we are giving you and we are not going to continue to pay for duplicative networks to provide voice. Instead, we are going to pay for one network, carrier of last resort, and provide broadband over it.

Mr. TERRY. Commissioner Tate.

Ms. TATE. Yes. I want to thank you and Mr. Boucher for all your work in this area and obviously, I think we have got some short-term problems that need some reform quickly and I hope the joint board is going to move on that, as the chairman said and Commissioner Copps and so I hope that we will be coming back with some of those solutions and then some longer term solutions on both the contributions and the distribution side.

Mr. MARKEY. OK. Quickly, please.

Mr. TERRY. Thank you again for all your work. I will be looking at all credible ideas regarding reform of the Universal Service Fund. As Commissioner Adelstein and Chairman Martin have already implied, there is already, sort of, indirect support of infrastructure, but we do need to fix the system first before we can talk about increasing costs on the distribution side, so I eagerly await the joint board's recommendation.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentlelady from California, Ms. Eshoo.

Ms. ESHOO. Thank you for recognizing me, Mr. Chairman. In my opening statement I made references to the AT&T-BellSouth merger. So I would like to drill down a little on this for the benefit of the full committee. The question that I would like to ask, Commissioner Tate and the Chairman, is what is the authority that you draw from to approve and then refuse to implement the agreement? And I would like you to describe, reference the exact provi-

sions of the Communications Act, sections of the FCC's rules. Commissioner Tate can go first. And other legal authority to support that action. But I ask because I think it is so highly unusual.

Mr. MARTIN. Sure.

Ms. ESHOO. You voted for it. There was a majority vote of the Commission, and then, as I described it in my opening statement, in my mind, it really mirrors these signing statements that are really troubling to people in the country. Commissioner Tate first, please. Can you tell us what authority you draw from to do that?

Ms. TATE. Well, I suppose first, this was presented by the companies to us.

Ms. ESHOO. You mean the companies told you that you should issue that statement afterward?

Ms. TATE. No, the merger, itself.

Ms. ESHOO. Well, I am not talking about the merger. I am talking about the statement that you and the chairman issued on the heels of a majority vote of the Commission, that you were not going to honor parts of the agreement of the merger that you had just voted for, so I am asking what legal authority, what authority do you draw from to have that stand? I mean, it is yes and no. Which one did you mean? The statement that you made after you voted for it or before?

Ms. TATE. I voted for the merger.

Ms. ESHOO. And what about the statement? Let me ask you this. What parts of the merger do you plan to enforce, and which parts of the merger do you plan not to enforce? Because that is really what that statement was about.

Ms. TATE. I think that oftentimes when we vote on something, all of us, in fact, most every time we vote on something, there are five statements in the record. We may not agree with everything that is in the order that was adopted, and so I think that——

Ms. ESHOO. Well, you can always talk about what you may not have agreed with in the vote. You have to develop consensus, we all do. A lot of times, it is 51–49 or 49–51, whatever way we see it, but I think it is rather extraordinary to commit to really not enforcing parts of the agreement of the merger that you voted for and I am asking you what authority? What was the meaning of it? Why did you say that?

Ms. TATE. There was one condition that would have proposed that the company present a tariff to us.

Ms. ESHOO. Did you vote for that? You voted for it. It was in the agreement.

Ms. TATE. Well, the tariff has not been filed, to my knowledge.

Ms. ESHOO. What about Chairman Martin? What parts of the merger do you plan to enforce and what parts do you not plan to enforce? Given your statement.

Mr. MARTIN. Well, sure. First, I don't agree we were going to approve the merger and then refuse to enforce it. We are going to enforce it.

Ms. ESHOO. All of it?

Mr. MARTIN. Sure. And what legal authority I have for our statement is the order itself. The order itself says that while these conditions are voluntary and AT&T will comply with them, that it does not change our policy, that it does not, in any way change our

precedent and that the Commission's policy and precedent will still go forward exactly as is. And its policy and precedent is that in separate actions, if you file a tariff——

Ms. ESHOO. I have limited time. I have 33 seconds left.

Mr. MARTIN. The order itself is——

Ms. ESHOO. Let me go to Commissioners Adelstein and Copps to comment on this.

Mr. COPPS. I would just note that, for purposes of judicial review, that the conditions to a merger are treated as rules, and they are subject to deference, and the question we are talking about here doesn't go to future proceedings, but it goes to the instant proceeding and enforcing this particular merger about this particular condition.

Ms. ESHOO. Commissioner Adelstein.

Mr. ADELSTEIN. Well, the normal process we use when there is a difference of opinion about an event is to dissent. If there is something somebody considers to be illegal or inappropriate in a merger, generally, I dissent if I don't think something is legal. And I have done that on a regular occasion. It is better to try and work it out in advance and get a consensus in advance rather than to subsequently say that something won't be implemented.

Ms. ESHOO. Thank you. I think my time has just about expired, so thank you, Mr. Chairman. Very unusual.

Mr. MARKEY. The gentleman from Georgia, Mr. Deal.

Mr. DEAL. Thank you, Mr. Chairman. As you heard from my opening statement, I am concerned about the retransmission consent as it is currently in place. I would like to ask some procedural questions first and then maybe move to your views on the way the system is currently operating. Chairman Martin, I guess I will ask you these procedural questions first. It is my understanding that when a content provider or programmer reaches an agreement with a distributor cable company, that those contracts generally contain nondisclosure provisions in the contracts. Is that generally the rule?

Mr. MARTIN. That is correct.

Mr. DEAL. And does that mean that after the contract is concluded that they cannot disclose, even to the FCC, the terms and conditions?

Mr. MARTIN. That is correct. We don't even have the information about that in many instances.

Mr. DEAL. Do you have authority to demand disclosure of that?

Mr. MARTIN. I would have to go back and research it and give you an exact answer, but I am not sure we have authority currently.

Mr. DEAL. Well, that is after the contract is concluded. During the course of the negotiations, are you made privy to the terms of the offers and counter-offers?

Mr. MARTIN. No. The only instance in which we were was when someone filed a complaint at the Commission, but other than that, no.

Mr. DEAL. Do you have authority during that period to require disclosure of it?

Mr. MARTIN. Again, I am not sure. I am not sure that we do because we don't have a specific role in that, and the Commission has

determined that unless someone files a complaint with us about it, I don't think we do.

Mr. DEAL. Well, isn't the overall test whether or not the negotiations are in good faith, and if you have no knowledge of what the negotiations entail, how do you make a determination of good faith?

Mr. MARTIN. That is right. What I meant is that we only evaluate whether it is in good faith or not if someone comes and complains that it is in bad faith.

Mr. DEAL. So if someone complains?

Mr. MARTIN. If someone complains, then it comes to our attention, but other than that, we are not privy to what is going on.

Mr. DEAL. So if a complaint is made, you then have authority to require disclosure?

Mr. MARTIN. I think so. In the context of a complaint, I think we would be, if someone was saying this is in bad faith, then we would ask the parties about the allegations of bad faith. If that involved the underlying prices, then we potentially could.

Mr. DEAL. And what would be the remedy if you determined that the negotiations are not in good faith?

Mr. MARTIN. In 1999 or 2000, the Commission determined that actually the only remedy was to order them to go back to the negotiating table and then engage in conducting good faith. The Commission actually determined that they didn't have the authority to order carriage at a certain price in the implementation of the Satellite Home Viewer Act; the Commission determined it didn't currently have the authority to order that.

Mr. DEAL. And I believe, in the most recent Sinclair dispute, the Media Bureau said they didn't have authority to order arbitration. Has the Commission, as a whole, made a similar determination?

Mr. MARTIN. They did in the context of the Satellite Home Viewer Act implementation, which was based upon the Cable Act retransmission consent negotiation standard, so they did. That is why the bureau was able to do that, and the current appeal of that decision is before the other commissioners now.

Mr. DEAL. All right, let me start down the road, then. Mr. Adelstein, first of all, what is your overall view of the way retransmission consent is functioning, currently?

Mr. ADELSTEIN. Well, it provides broadcasters with the opportunity to negotiate compensation for their programming. I understand that. It is not clear whether Congress achieved its intent, though, to prioritize the interests of viewers ahead of the cable operators and broadcasters. The FCC's role is, as you said, to ensure good faith negotiations. There has got to be a way that we do that. In fact, there was a colloquy in the United States Senate during the adoption of this bill that did indicate that we would have the authority to enforce and ensure that there is a completion of these negotiations. I think the FCC should protect the viewing public through prompt resolution, binding arbitration, if necessary, and interim carriage are things that are, according to legislative history, potentially within our authority to do if no consensus is reached between the parties.

Mr. DEAL. Mr. Copps.

Mr. COPPS. I would agree with Commissioner Adelstein. Our latitude to act in retransmission consent is not wide, basically limited to the good faith negotiations. We do need to protect the consumer, and I think there is a need for an overall look at whether retransmission consent is working as it was originally intended to work and whether it is really protecting small broadcasters, protecting small cable. I think an argument can be made that maybe the way it is working out now, it is really kind of encouraging consolidation in the industry rather than competition.

Mr. DEAL. Chairman Martin.

Mr. MARTIN. I think our current authority is very limited as to what we are able to end up doing when there is a complaint back and forth. I think the concerns about the way the retransmission consent is working with the broadcast providers is a symptom of the larger problem of how content providers are increasingly charging consumers for all of the content that is included in the expanded basic cable package. And all of it being done without any kind of transparencies as to how much consumers are having to pay.

Mr. DEAL. I appreciate that part of your testimony. As you know, it is a concern of mine.

Mr. MARTIN. And I think that you have to put it in the context that the broadcasters are asking for sometimes significantly less than many of the other cable content providers are asking for and demanding when they are including expanded basic. I think that some additional opportunity for consumers to see how much they are paying for all of their content would be helpful across the board, not just in broadcast, but in all of cable.

Mr. DEAL. Ms. Tate.

Ms. TATE. Yes. I think you all heard about one issue that had come up, but generally, I think that the process is working and that thousands of these agreements are being done every day. I do think we need to continually review the roles that we have before us.

Mr. DEAL. Mr. McDowell, you only get 10 seconds.

Mr. MCDOWELL. I am used to that, being the most junior member of the Commission. I do think we need an overall thorough view of why the cost of content, overall, is going up, so as a preliminary matter, I agree with Commissioner Tate that the vast, vast majority of retransmission consent negotiations are going well, and we don't read about them or hear about them, and that is good news, but we do need to certainly focus to see if there is something else that can be done. I hesitate to put the Government's thumb on the scale in this regard, but on November 26, when it came, for instance, to the Mediacom Sinclair dispute, I did ask both CEOs of both companies to come in and join me and Commissioner Adelstein to see if we could help them facilitate in some way a private sector solution to this. I think it ultimately did help bring a resolution to that problem, which came on the eve of the Super Bowl.

Mr. DEAL. Even though you will never know what the negotiation finalized was?

Mr. MCDOWELL. Well, I think by the fact that both parties consented to an agreement, that is probably a sign that they can at

least tolerate the terms of their agreement, so that is a little ray of hope.

Mr. DEAL. Thank you, Mr. Chairman.

Mr. MARKEY. OK, gentleman's time has expired. Gentleman from Michigan, Mr. Stupak, is recognized.

Mr. STUPAK. Well, thank you, Mr. Markey, for holding this hearing, and thank you, Commissioners, for joining us. As it has been said, the last time we had all five Commissioners here was like over 3 years ago. As chairman of the Oversight and Investigations Subcommittee, I intend to work with Chairman Dingell and Chairman Markey to exercise vigorous oversight of the agency. I hope our relationship can be productive, and that is why I was concerned, Chairman Martin, when I heard that you had a closed door meeting with the Republican members of the Energy and Commerce Committee.

You should feel free to share with all of us things you have on your mind at that meeting, and I look forward to having public and frequent dialog with you. It is astounding what this one hearing can lead to. According to press reports, the Commission is cleaning house. The FCC has asked industry to withdraw petitions from as far back as 1995. That is over 12 years ago. I am not even sure we had e-mail on Capitol Hill in 1995. Congress makes laws and we expect the FCC to enforce them. Leaving petitions sitting for 12 years doesn't seem like enforcement to me.

So Mr. Chairman, my first question is ignoring consumer complaints is also not enforcement. The Commission is finally attempting to clean up approximately 70,000 do not call registry complaints from as far back as 4 years ago. So is it true the FCC is now sending letters to Americans about their complaints saying, in essence, we have received your complaint, but we need more information to act on it. Yes or no?

Mr. MARTIN. Yes, the Commission is sending letters to consumers who didn't file enough information for us to act on the complaint, that can you give us more——

Mr. STUPAK. Do you close out the consumer complaint after sending out one of these request letters?

Mr. MARTIN. Yes. We say that we can't act on it without getting further information.

Mr. STUPAK. Well, I think that reflects pretty poorly on the Commission's ability to create and enforce consumer protections. So let me ask you this, turning to consumer protections, when the Commission reclassified DSL and cable modem services as information services, the Commission failed to clarify what consumer protections applied to these services. That is over 54 million broadband subscribers lacking consumer protections. In fact, the FCC asked for comment on this issue in 2004 as it relates to VOIP and again in 2005. Today, the Commission still has not issued consumer protection rules. Is the Commission going to establish consumer protection standards for broadband services?

Mr. MARTIN. I think the Commission has taken some steps to address some of the consumer protection issues that were raised in that notice. We have taken individual actions on things like 911 and Universal Service and making sure that we updated our rules

to reflect that already. We have also tried to take steps in the disability area, but I think we will issue generally rules, yes.

Mr. STUPAK. You expect some more rules to come out. When do you expect them to be out?

Mr. MARTIN. I think we have tried to address them in order of how critical they were, but I think we will probably be able to—I would assume this year we will probably address the remaining issues that are there.

Mr. STUPAK. OK. In 2006 I joined with several of my colleagues on this committee in sending you a letter regarding small auction areas for the 700 MHz auction that is supposed to be at the end of the year. At a minimum, one band of this spectrum should be auctioned by cellular market areas, rather than the economic area groupings. This would break down the spectrum auction into 734 geographic areas, rather than six, which I think is very critical for rural build-out. Mr. Chairman, do you support auctioning at least one band by cellular market areas rather than the economic area groupings?

Mr. MARTIN. I definitely support auctioning off multiple bands in smaller areas than the largest groupings you identified.

Mr. STUPAK. And would you go with the cellular market areas, then, which are 734 as opposed to the six biggies?

Mr. MARTIN. I think there is a current proposal in front of the Commission that was put forth by a group of rural wireless providers who asked for a smaller——

Mr. STUPAK. When would you expect to issue an order on that?

Mr. MARTIN. That is the order that we need to be issuing to be able to go forward with the auction, in April, to go forward with the auction in October, and I think we will try to accommodate exactly what the rural wireless providers have asked for.

Mr. STUPAK. And you expect that to be in April?

Mr. MARTIN. Yes.

Mr. STUPAK. OK. Let me ask you another question on spectrum. The Commission has before it a proposal called the Broadband Optimization Plan, BOP. This plan would re-band the 24 MHz for public safety to allow public safety to do broadband in addition to narrowband or voice communications within their newly allotted 24 MHz. It is my understanding that public safety is strongly in support of BOP. Mr. Chairman, do you support this plan, the BOP plan, yes or no?

Mr. MARTIN. Yes.

Mr. STUPAK. How about the other Commissioners? Mr. McDowell, do you support the BOP plan?

Mr. MCDOWELL. I am still examining it.

Mr. STUPAK. All right. Ms. Tate?

Ms. TATE. I had a meeting this week, but I am still looking at it.

Mr. STUPAK. OK. Mr. Copps?

Mr. COPPS. I think the objective sounds good, but I need to look at the details of it.

Mr. STUPAK. OK. Mr. Adelstein?

Mr. ADELSTEIN. Yes, we have looked at it. I think it is a very good idea, and I am hopeful that I can support it.

Mr. STUPAK. OK. Two out of five. We only need one more. Any idea when some of these decisions will be made? Some of you indicated more information.

Mr. MARTIN. The decisions regarding the spectrum auction on the commercial side need to end up being made, as I said, in April or May for us to continue with the auction in the fall. I think that that would then allow us to move forward with some of these public safety issues this year and probably in the timeframe of the fall, while the auction is going on. We can then try to identify what the public safety should be doing with these pieces of spectrum that aren't being auctioned.

Mr. STUPAK. All right. I represent small providers, and when Mr. Hill speaks of a city of 18,000, that is the biggest city I have, so that is big time. Should change that song to "Big City." But my small providers have provided a service in their communities and they want it at a low price. The small cable systems in my district, and we are talking about systems with fewer than 500 subscribers, are very, very concerned about how some regulations that have been put on them are going to impact their ability to offer broadband or even stay in business.

I am a strong supporter of CALEA and giving law enforcement tools they need, but I have heard concern from a number of my small providers about the cost of CALEA for these very small systems. Northside TV Corporation in my district may have to drop broadband now because the upfront costs for CALEA are approaching $10,000 plus $750 a month. I would like your response, in writing, about whether there is a way to allow the small systems a waiver until they have a higher number of subscribers, maybe a thousand.

And that is what I would like, in writing, because I would like this to be given a little bit more thought, because these companies are really the most responsive to local law enforcement because they live in the communities, and many of these providers are actually municipal providers. So if you could, I would like that in writing, if I can.

And moving to interconnection, Mr. Chairman, while the vast majority of Americans still receive their telephone service from incumbent local telephone companies, VOIP providers are making incredible progress in rolling out new products. Do VOIP providers have guaranteed interconnection rights that will allow them to compete?

Mr. MARTIN. Yes. Actually, the Commission just issued an order reaffirming that in South Carolina, Time Warner was having difficulty getting interconnection with the local incumbent. We acted on that order confirming that they do have those interconnection rights, and they also have the rights to local numbers in that area so they can compete.

Mr. STUPAK. OK, very good. I think I will follow that up with you later. Just one more thing. I have been looking through the FCC Inspector General reports and I have some questions on the report about the FCC's 2005 financial statements, and we will follow it up at a later time.

Mr. MARTIN. Thank you.

Mr. STUPAK. With that, I guess my time has expired. Thank you, Mr. Chairman.

Mr. MARKEY. Right. Gentleman's time has expired. Chair recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman, and I welcome the Commissioners here. We all have our own little niche markets that we address, and although it seems like there is nothing good going on, I don't know. We had, and Anna Eshoo was with me there last night at the E–911 awards banquet. Usually one of you all are there. Did anybody make it to the E–911 awards banquet? Commissioner Adelstein, you usually are there.

Mr. ADELSTEIN. We were actually preparing for this morning.

Mr. SHIMKUS. Good answer. Why I mentioned that is because we have had some great successes with Government and industry nationally and locally working to get their own deployment, and there are some great success stories. We have also had, and my colleague, Mr. Doyle, I am going to have to talk to him off of hearing time, we have had Mr. Hatfield here numerous times throughout those years. I am going to have to ask you, I was trying to follow that line of questioning, and I just couldn't understand what was that all about, so if you would give me some time, I would be happy to discuss it with you.

Because as far as the first time responders and the progress we made in just my 10 years on 911 and then E–911 is just truly remarkable, and it is from working together, understanding that the industry, the local governments and the PSAPs, all those have to, and they are not all there at the same time. And so sometimes it is the corporate entity that is well ahead, and sometimes it is the PSAP that is well ahead, and sometimes the ILEC is behind, and so there have been some positive success stories.

And hopefully, that will also encourage, we start with inoperability, and we try to encourage people to work together and push because most of us, especially in this committee arrangement, have a hard time dealing with post–9/11 and their inability to communicate interoperably at Katrina. We are embarrassed by it, and we just can't sustain that again, I mean, as a nation and as public policy folks, so it sounds like there is a lot of interest in that.

I have a couple questions. One just follows up on what we moved originally in the act on this side. It was inserted into the Safe Port Act at the end of the year; a big success so far. But there is an advisory committee report that is due, it looks like October 14 of 2007. Chairman Martin, do you think that they will meet the guidelines on that report by the time stated, and do you have any ideas where they are headed?

Mr. MARTIN. I don't have any ideas on where they are headed, but I do think that the advisory committee has met several times already. They have met as recently as earlier this week, and I am confident that they will meet their timeframe for making those recommendations to us, and I certainly agree on the progress we have made on 911 issues, in general, on both implementation for VOIP 911 and E–911.

Mr. SHIMKUS. And I am glad you mentioned VOIP because one of the award winners last night was a former legislative staffer for NENA who now works for Vonage, an IP provider, and of course,

we had the 911 issue there, and it looks like Vonage is almost 95 percent covered, at least that is the bio that they told me to read when I helped give this award, 6600 local communities, the PSAPs, they work with Vonage to do that. That is a great success versus where we were just last year.

Using Vonage as an example, if they are at 94 and they got 6 percent, you are looking at other IP providers, one of the dilemmas is the inability for the IP providers to have the same limited liability protection as voice. Can you speak to that and what we might be able to do to make sure—it is tough to be able to help first line people in your industry if you know that even if you do all you can to connect the dots and get people there, then you are going to be sued for not being quick enough.

Mr. MARTIN. I think that the Commission has done all they can on trying to make sure that voice providers are providing that service and are protected at the maximum most they can. We can't do anything else on limited liability. I have testified before that that is actually one of the things I think will be helpful for Congress to end up addressing. I know that was in your bill in the last Congress, in Senator Nelson's bill on the Senate side, and I think that is a very helpful thing to address, along with several other issues.

I think that it is critical to have an understanding that our voice over IP 911 rules that we implemented shortly after I became chairman in May of 2005, initially, all of the voice over IP providers said that it was on a timetable that couldn't end up being done and that this was something that was unreasonable, and as you said, many of those same voice over IP providers today are at over 90 percent coverage, and it was by working hard, holding their feet to the fire, working with the public safety community to make sure that this ended up getting done. And indeed, I wasn't there last night, but I was at the E–911 Institute dinner last year, where I received, on behalf of the Commission, their award for what we have done in that area.

Mr. SHIMKUS. Thank you. And just to follow up, do you think that the liability protection issue is a legislative fix that has to be moved through here?

Mr. MARTIN. I think that is a legislative fix. I don't think that is anything that the Commission can end up doing.

Mr. SHIMKUS. Mr. Chairman, I recommend that we claim that jurisdiction from the Judiciary Committee and move it. I yield back.

Mr. MARKEY. Gentleman from Texas, Mr. Gonzalez.

Mr. GONZALEZ. Thank you very much, Mr. Chairman. How much time do I have? I waived opening.

Mr. MARKEY. You have 8 minutes.

Mr. GONZALEZ. Eight minutes. I didn't even notice. Thank you very much. The first question, and I apologize, obviously, being in the majority has many advantages, unfortunately, the drawback is we are just expected to be many more places, but it is nice to have a voice, believe me. The first question is going to be on Universal——

Mr. BARTON. Times are tough in the majority.

Mr. GONZALEZ. The good thing, it wasn't a real hard act to follow. Let us go on. Universal Service Fund. Would you agree, and

this is directed to the Chairman and to Commissioner Copps, the revenue source is shrinking and that the recipient base is growing?

Mr. MARTIN. Yes, we did try to expand the revenue base just last summer and trying to take into account voice over IP providers and increase the rates for, the safe harbor rates for wireless, but yes, in general, long distance rates or long distance revenue is shrinking, so we did try to expand the base there.

Mr. GONZALEZ. All right. And the recipient base is growing.

Mr. MARTIN. Oh, yes. I am sorry. Yes, the recipient base is growing.

Mr. GONZALEZ. Commissioner?

Mr. COPPS. Yes and yes.

Mr. GONZALEZ. All right. So then the question is what do we do to address each of those particular points?

Mr. MARTIN. I think that we should move on the contribution side to something that is both technologically neutral and broader, and I think we should move to a numbers-based contribution system in which we assess telephone numbers, Universal Service contributions and telephone numbers. That not only expands the base quite dramatically, but also establishes an economic value to telephone numbers.

As Congresswoman Harman and I have talked about many times, people don't see any reason why they shouldn't be able to take telephone numbers and hoard them, or they are using telephone numbers and area codes for gas pumps and ATM machines. And because there is no economic value to them, they are utilizing them in a wasteful manner that harms small business. I think we should be assessing Universal Service based upon telephone numbers as a broader base, and that would be technologically neutral.

And then on the distribution side, I think we should be moving to reverse auctions, which would allow for us to increase the capability that is being provided but get rid of the duplication that is occurring on the distribution side today. And I think that that would allow us to say we are going to provide funding for one carrier of last resort in an area and say for how little money can you provide service and what quality of service can you provide as opposed to how many networks can we fund to just provide voice services today.

Mr. GONZALEZ. Thank you.

Mr. COPPS. I agree on the need for a fix. I am not convinced that we need to go quite that far, as I tried to indicate in response to an earlier question. I think if we had authority to assess on intrastate, we would greatly reduce the contribution factor and expand the revenue base. We have to decide what Universal Service is for and if it is going to include broadband, and if indeed it is, then we need to start collecting from broadband. Certainly, we have to do something about the identical support I think that is given to competitive ETCs in the area. I think if you did those things, and we have already tried to true up wireless and VOIP, and have vigorous oversight of the fund and make sure we do an auditing of the fund, I think we would be pretty well down the road toward a solution to the problem of Universal Service.

Mr. MARTIN. Let me just add. I don't disagree with Commissioner Copps on if we had the ability to assess intrastate revenue.

Indeed, Commissioner Copps and I have both signed a letter to Congress before suggesting that would be a helpful authority for the Commission to have when we were both joint board members. And Commissioner Adelstein, I believe, supports it, as well. So the ability to assess intrastate revenue would be an additional potential source. We are prohibited now by statute and by law; a Fifth Circuit decision in 1998 prohibits us from doing that, currently.

Mr. GONZALEZ. All right. Thank you very much. The second part, and I apologize, since I was at another hearing, I wasn't aware of the previous questions. This happens often enough. So I may be repetitive. And for that I do apologize to the witnesses and to the members of the committee. This question would go to Chairman Martin and Commissioner Adelstein, and it goes to net neutrality. I am sure that it has been touched on, and you know it is highly controversial. As the markets play out, technology moves forward. Business models change day to day. It is ever evolving.

And I understand that individuals say that keep the democratic nature, small "d," of the Internet, the open architecture and such. But the truth, there are so many forces, dynamic forces out there. I know everyone out there that may be reading about it and listening to it, they believe that their ability is going to be diminished in sending an e-mail or doing a search. This issue is really not about that. This issue is really about the commercial context of the Internet and what it represents and the way of doing business, and I mean, this is the most incredible thing that has happened, probably in the history of the United States.

See if you agree with me, because I was talking to somebody and this is the information that they indicated was accurate, that downloading a single half hour TV show on the Web consumes more bandwidth than does receiving 200 e-mails a day for a full year. Downloading a single high-definition movie consumes more bandwidth than does the downloading of 35,000 Web pages. And I guess you know where I am going.

In today's technology, where we are today, as far as the capacity and the ever increasing use of bandwidth on video and such, where are we today as far as still being able to service the commercial uses, the individual purposes of the Internet, and what needs to be done in the future, if anything, to ensure that capacity will be there? And I will go to Chairman Martin.

Mr. MARTIN. Well, certainly when you talk about net neutrality concerns that people have raised, you are absolutely right. I mean, the Commission has rules that say that network operators can't block consumers' access to the Web sites and they can't block consumers' access to e-mail, so the Commission has principles in place that we have demonstrated in the past we would enforce. What we are trying to find is an appropriate balance on how you provide incentives for infrastructure deployment so that the people that are wanting to hook up consumers to broadband networks are able to do so in a way that they are still able to recoup some of those costs. And I think you are raising the concern that consumers are demanding more and more video over their Internet or using more and more of that underlying capacity, which is why continuing to find and create a regulatory environment that allows for them to invest in that infrastructure and then still be able to recoup those

costs is critical to ensuring that we have a broadband deployment like I think we need.

Mr. GONZALEZ. Thank you. Commissioner.

Mr. ADELSTEIN. Well, this is certainly a difficult issue. I think that promoting broadband and freedom on the Internet go hand in hand. Consumers have great appreciation for the ability to go wherever they want, to have access to different applications providers and not to have a network operator that may have a dominant position in the market be able to control their access to the Internet, so they consider that very important.

And we have been very careful in thinking about how network management issues can be protected while ensuring the consumers' rights to have the kind of freedom that they have come to enjoy on the Internet are protected. Consumers, I think, really see this as a remarkable source of innovation; a world of economic and social opportunities opened up to them and we want to preserve that open nature of the Internet that has always been its character. I think the FCC's work isn't done on this.

I know Congress has done a lot of work on this. I think that we have to continue to monitor the situation. I certainly think that we need to explore the parameters of various network neutrality ideas. We came up with one on our own in conjunction with AT&T with regard to their merger that was something that after that was adopted, AT&T's stock hit an all-time high. So certainly, Wall Street doesn't see that proposal as in any way being an impediment to broadband deployment.

Mr. GONZALEZ. And thank you very much. All that accomplished without legislation. I yield back.

Mr. MARKEY. OK, gentleman's time has expired. The gentlelady from Wyoming, Mrs. Cubin.

Mrs. CUBIN. Thank you, Mr. Chairman. In the audience today is our representatives of a company called TCT Communications, out of Basin, WY, and Basin, WY has a population of about, I don't know, around 500 people, I think. At any rate, this is the kind of district that I am representing, and I think while reverse auctions seems like a good idea on its face, unless it is properly set up, it could be extremely harmful to companies like TCT and other small companies.

And the problem boils down to this, as you know, as a matter of policy, the current policy that we have would allow, for example, just example, Verizon to bid zero on a reverse auction because they could absorb the costs elsewhere, and what would happen, then, in that case is they would win the auction, and companies like TCT would have a big investment in the equipment and so on that they have deployed, and so they would be left out of the USF completely. So I guess what I would like to know is, is there any possibility of eliminating the identical support rule? Is that reasonable at all? Mr. Chairman.

Mr. MARTIN. Eliminating the identical support rule?

Mrs. CUBIN. Right. Or changing it to protect the companies that actually have a large investment.

Mr. MARTIN. Oh. I think that whenever you talk about trying to change our Universal Service distribution going forward, you have to take into account the companies that have invested in their un-

derlying infrastructure based on the expectation that they are going to continue to get Universal Service. So we would have to find a way, when we make this kind of a change, to phase this in so that people would be able to take that into account in their underlying capital infrastructure going forward. So I think we do need to end up doing that.

Mrs. CUBIN. Did you say we need an update on that?

Mr. MARTIN. We need to phase that in. If we make the kind of change I was talking about, we would need to phase that in over time to allow and give people enough notice that they would be able to still recover the costs of the investments they had made in the past, so I think we would need to end up doing that.

Mrs. CUBIN. OK, obviously you think that would cover the entire problem. How about you, Commissioner Copps? And by the way, I think that I actually have 3 more minutes than is on the clock since I didn't give an opening statement. Mr. Copps.

Mr. COPPS. I think there is much to recommend in your statement of addressing the identical support rule. It won't be easy to do that, but I think that may be the preferable way to go, vis-a-vis a cap on the CETCs. A word on reverse auctions that you have raised, because a number of questions have been raised. This has been referred to the joint board, and there is no unanimity there on this subject right now, I think it is fair to say. It raises a lot of questions.

Some may see this as kind of a deregulatory initiative and all, but it raises a lot of questions with regard to does it encourage kind of minimal kinds of service rather than really investment? What happens when the winner of the auction maybe leaves carrier of last resort responsibilities and so on, and so I think we have to be aware of that, and I think it implies some kinds of standards so those who think it is less intrusion from the FCC may discover that it is more intrusion, in the final analysis, to administer something as complicated as that.

Mrs. CUBIN. Thank you. I understand that the Commission's recent notice of proposed rulemaking on program access says it does not cover the issue of shared headends and that this committee, in the COPE Act last year did pass that, so I wonder if the FCC, if the Commission thinks that it is appropriate to amend their rule, to change the order on this, or do you think legislation is necessary if we wanted to get shared headends passed again?

Mr. MARTIN. The issue you are referring to is what they also call the terrestrial loophole. In other words, the program access rule doesn't apply to content that cable operators distribute only over the ground, that don't use satellites to distribute. And currently, that was the way statutory program access provisions were put in place and so I agree that it presents some problems and challenges for not being equitable in the way that that statute was implemented. I think that the Commission has traditionally been concerned that the statute was very specific on how the program access rule should apply, and I think that we didn't think we had the authority to extend it on the terrestrial basis to get to the so-called loophole issues you are talking about. So I think if Congress addressed it like they did last year, obviously the Commission would implement it. We have actually put conditions on some of the merg-

ers in the past but have tried to say that the same kind of rules should apply to address in that manner.

Mr. MARKEY. The gentlelady's time has expired. In order to claim 8 minutes, a member of the committee has to be here before the conclusion of opening statements in order to claim the additional 3 minutes, and those are the rules of the committee that were in order when the Republicans controlled the majority, and we are just maintaining the same rules.

Mrs. CUBIN. Mr. Chairman, I was 30 seconds late because there was an enormous backup of traffic on the George Washington Parkway and so therefore—I have a very expensive piece of evidence that I would like to show, so I would ask unanimous consent for an additional——

Mr. MARKEY. As the author of the controversial daylight savings time amendment with Mr. Upton, I can understand there are some people still making adjustments to the lost hour, and so since the gentlelady was only 30 seconds late, I ask unanimous consent that she be granted the 3 minutes.

Mrs. CUBIN. Thank you. And I won't go over, but I do have a chart. This is about DMAs. And I just want to point out how ridiculous DMAs in some areas are. The chart is a little confusing from down there, I am sure, but what I want to point out to you is that here is one DMA, this whole area. And here we have a Casper Riverton TV station area, but here this comes all the way from Denver. This DMA goes all around here, all the way up to the northern part of the State, this distance is probably 700 miles, 600 or 700 miles, and we have a station here, we have one here. Then here is another one. Rapid City is the area that broadcasters shared in Wyoming, halfway across the State, and these are really vast areas, and so the point that I want to make is that it makes no sense the way these DMAs have been divided, and I wonder if the Commission would comment on this and make any suggestions for changing.

Mr. MARTIN. Sure, sure. The Commission has in front of it an order I put in front of it last fall that would say that for situations like this in which DMAs cross State lines, consumers in those areas should be able to say that they want their local broadcast stations covered even if their city is technically in another DMA. For example, you are talking about Denver up to Casper, so it is crossing State lines. The order in front of us would say that we should, under those circumstances, say that the local broadcasters should be carried by their local cable systems and their satellite systems even if they were technically in a different DMA and so I think that this is creating some confusion, and I think that the Commission has a way to try to address it.

Mrs. CUBIN. But it is only person by person allowing them to——

Mr. MARTIN. Oh, no. We would do it city by city for the DMAs that are crossing State lines and creating this confusion.

Mrs. CUBIN. Thank you. And thank you, Mr. Chairman.

Mr. MARKEY. The gentlelady's time has expired. Chair recognizes the chairman of the full committee, Mr. Dingell.

Mr. DINGELL. Mr. Chairman, thank you for your courtesy. These questions are to Chairman Martin. Mr. Chairman, these questions can be answered, I believe, yes or no. First, an agency should base

its action on a solid record that is fair and impartial and created in an open and transparent manner. Do you agree?

Mr. MARTIN. Yes.

Mr. DINGELL. Mr. Chairman, at the meeting on December 20, 2006 the Commission voted to preempt local governments on cable television franchising. Is that correct?

Mr. MARTIN. Under certain circumstances, yes.

Mr. DINGELL. Well, all right. At that meeting there was a disagreement about the sufficiency of the record of franchising abuses, an issue on which you and another Commissioner differed. Is that correct?

Mr. MARTIN. Yes.

Mr. DINGELL. Would you submit to us a copy of the relevant parts of the record of that discussion, please?

Mr. MARTIN. Sure.

Mr. DINGELL. A month later, on January 26, Verizon stated, in a letter to your office, that you requested that they submit an additional filing into the official record after the Commission voted on the order. Is that true?

Mr. MARTIN. No, we actually asked for clarification after the city of Tampa had written us a letter.

Mr. DINGELL. Was that done in writing, or was that done orally, or was that done at the time the record was completed?

Mr. MARTIN. The city of Tampa wrote us after the hearing and after the open meeting.

Mr. DINGELL. Was that in writing?

Mr. MARTIN. It was in writing.

Mr. DINGELL. Would you submit that to the committee, please?

Mr. MARTIN. Of course.

Mr. DINGELL. I have here a copy of the letter to the Commission in response from Verizon, which I ask, Mr. Chairman, be inserted into the record.

Mr. MARKEY. Without objection, it will be inserted.

Mr. DINGELL. Now, this document, then, was placed in the record after the Commission had voted and adopted the item. That submission concerned the very matter on which you disagreed with another member of the Commission. Is that correct?

Mr. MARTIN. It was actually one of the issues we had disagreed with one of the other members of the Commission.

Mr. DINGELL. Now, do you believe that asking outside parties to submit new facts after a vote is an appropriate way to assume and to assure a fair and impartial record upon which an agency vote is based?

Mr. MARTIN. I think it was in this circumstance, because the city of Tampa had first written us and had said something we relied upon was inaccurate after the record had closed, so we asked, since they had made an assertion after the record was closed that something was inaccurate, we asked for the other parties that were also involved to submit theirs.

Mr. DINGELL. Was any other party to that proceeding afforded the same right to make additional submissions?

Mr. MARTIN. The other parties that were involved in the city of Tampa allegations were given that right then.

Mr. DINGELL. They were. Were they notified they were given that right?

Mr. MARTIN. Yes. The city of Tampa and Verizon——

Mr. DINGELL. Was that done in writing, or was that done orally?

Mr. MARTIN. We called them and asked them for clarification in light of the city of——

Mr. DINGELL. Would you submit the telephone log on that matter, please?

Mr. MARTIN. We will try to find the telephone log book.

Mr. DINGELL. Just a question. When you afford one party a right and you notify the other, isn't this a matter which should be done formally and on the record and not just orally?

Mr. MARTIN. That is why we actually asked for Verizon to respond in writing and put that in the record.

Mr. DINGELL. But you didn't ask in writing for the other participants to the proceeding to submit additional information on this particular point, did you?

Mr. MARTIN. There were only two parties to it, the city of Tampa and Verizon, and we wanted to make sure both had an opportunity.

Mr. DINGELL. But you never submitted that request to others in writing to respond on the record to these points, did you?

Mr. MARTIN. No, I didn't ask them in writing. I asked them orally.

Mr. DINGELL. OK. Now, I have a curiosity here. We have talked about this business of preemption. The order that came out of the proceeding that was recently held, the Commission says that the order was based on removing unreasonable barriers to entry. Is that language used anywhere in section 621?

Mr. MARTIN. Section 621 says that local franchising authorities cannot unreasonably refuse to grant a second franchise.

Mr. DINGELL. Does it say unreasonable barriers anywhere?

Mr. MARTIN. No, it says unreasonably refuse.

Mr. DINGELL. All right. Now, the barrier justifies preempting local law, but it does not make such requirements against State law. Is that correct?

Mr. MARTIN. That is correct.

Mr. DINGELL. Now, I find this curious. The local units of governments are creations of the State, and as such, when they do such orders within State law, their orders are respected under State law, is that not so?

Mr. MARTIN. Yes. Obviously, if the State——

Mr. DINGELL. OK.

Mr. MARTIN. That would preempt what the local municipalities have done.

Mr. DINGELL. So here, through some rather quaint process, you appear to have said we will not preempt State action, but we will preempt the action of a State subdivision. Is that correct?

Mr. MARTIN. We said that to the extent that the local communities were acting under the authority of the Telecommunications Act, then we said that these were parameters around what would be an unreasonable refusal to grant, to franchise. The States that had acted separately, we said we didn't have enough of a record to determine whether or not those would violate the statute.

Mr. DINGELL. Let us look at this. The local community may act under two authorities. One is the authority of the Federal Communications Act. The other is the authority that they are given and have been given long ago by the States to supervise affairs within their city boundaries, is that not so?

Mr. MARTIN. That is right.

Mr. DINGELL. So you have then preempted their action under the Federal Communications Act. What have you done with regard to local law? Have you also preempted that?

Mr. MARTIN. The State laws we did not preempt, so to the extent that there were State laws that they were acting under, no, we did not.

Mr. DINGELL. If a city acts under State law, are you preempting the action of the city if they are acting under general authority given them by the State?

Mr. MARTIN. No, the Telecommunications Act said that they could not unreasonably refuse to grant a franchise and we said that these would be the parameters of that. If they are acting under separate authority, then no, that wasn't involved.

Mr. DINGELL. I want this to be very, very clear on the record that we will be submitting to you an inquiry on this particular matter in writing because I want the record to be very clear on that. Now, Mr. Chairman, I would like to submit a letter of inquiry in addition to the matters before the committee and I notice that several members of the committee have made similar requests to me. I would ask unanimous consent that the record remain open so that those may be inserted in the record.

Mr. MARKEY. Without objection, so ordered.

Mr. DINGELL. And Chairman Martin, I assume that you will respond to the questions.

Mr. MARTIN. Of course.

Mr. DINGELL. Thank you. Now, yes or no. Will you complete the 2004 and 2005 VOIP and Broadband Consumer Protection proceedings by no later than 6 months from this time?

Mr. MARTIN. We will try to. I think I said that I thought we could try to do it by the end of the year, but we will try to do it in the next 6 months, of course.

Mr. DINGELL. Now, there is a very interesting matter that has come to my attention. The FCC, in January 2005, began an investigation into potential violations of sponsorship identification rules involving a certain commentator by the name of Armstrong Williams. He had a contract with the Department of Education that stated that Mr. Williams would regularly comment on certain matters during television broadcasts in response to generous payments by the Department of monies. Have you completed an investigation on this matter?

Mr. MARTIN. We began an investigation of the 12 broadcasters who are identified as ever having provided Armstrong Williams——

Mr. DINGELL. Have you completed an investigation?

Mr. MARTIN. We completed the investigation in relation to seven of them who came back and said they did not put on any of the Armstrong Williams shows in question. And there are three that we have ongoing investigations and we sent further follow-up letters to——

Mr. DINGELL. So you have an ongoing investigation going on at the agency?

Mr. MARTIN. Yes.

Mr. DINGELL. I was on this committee years ago when we went into the question of payola. Have you studied the history of that?

Mr. MARTIN. I would try, but not enough——

Mr. DINGELL. There was an interesting thing. It resulted in departure from public service by a large number of people, including folks at the Commission. And if my memory serves me correctly, it also resulted in some goodhearted folks going to jail. This sort of reminds me of this. Is there other information you need on these matters?

Mr. MARTIN. From at least one broadcaster, as I understand, we did not get complete information on the most recent letter we just received from them last week. So there is some more information, but I will have to get back to you on the exact status of what information we need from the three——

Mr. DINGELL. Now, I do not want to help you with the substantive——

Mr. BARTON. Mr. Chairman, can I gently point out that the full committee chairman's time has expired?

Mr. DINGELL. I was looking. It says I got 1 minute 53 seconds left.

Mr. BARTON. You are reading it wrong.

Mr. DINGELL. Well, Mr. Chairman, I know my colleague, the ranking member, my dear friend, Chairman Barton, would like to hear what I do, so I ask unanimous consent to proceed for 2 additional minutes?

Mr. MARKEY. No objection is heard. The Chair is recognized for 2 additional minutes.

Mr. DINGELL. Would you, Mr. Chairman, give us a full report in writing as to the status of the investigation of the Federal Communications Commission on this matter? And I would like, in that matter, to have you inform us what further information you need, what your judgments might be with regard to Mr. Armstrong Williams' settlement with the Department of Education and how close the FCC is to concluding four major payola investigations in the music industry. It seems like not just the musical industry, but very frankly, the Government, engaged in a little payola. And we would also like to have a statement as to whether you have adequate resources to address this, and again, we would like this report in the next 30 days, if you please.

Mr. MARTIN. Sure. Provided for both on the Armstrong Williams investigation and the status of them.

Mr. DINGELL. Thank you, Mr. Chairman, and I hope this was informative to my dear friend from Texas for whom I have the most enormous affection.

Mr. BARTON. I am totally enthralled.

Mr. MARKEY. We have a 15-minute vote on the floor followed by two additional 5-minute votes. We have 5 minutes left to go to actually make those votes. I will leave it up to the gentleman from Texas.

Mr. BARTON. I would like to take my 5 minutes and then rush to the floor and hope that the new majority will keep the vote open for 3 additional minutes on the floor.

Mr. MARKEY. The gentleman is recognized for as long as he has to take.

Mr. BARTON. Just 5 minutes, Mr. Chairman, because I was not here at the opening gavel. First of all, I got to tell you, I am bummed out that you are being so fair. I am being totally treated fairly, and I guess I am used to being treated unfairly, i.e. given exceptional treatment, so I have to commend you on being so fair in the way you are treating the minority.

My first question is to the chairman of the FCC. I have had a number of cable operators in to see me in the last couple of months, and they are of the opinion, Chairman Martin, that you are picking on them, that you are treating them unfairly and that the Commission is treating them unfairly on a whole series of issues, the most recent of which is this issue of the national video franchising rule which I am supportive of with the exception of the fact that the incumbent cable operators weren't allowed to have those same new rules. What is your answer to the concern that they have told me about that they are being picked on?

Mr. MARTIN. Well, I don't think we are picking on them, but I have to admit, I have to confess, I think most of the industries we regulate complain at one time or another that I am picking on them whenever we don't end up agreeing. As far as trying to end up implementing, giving them the same relief on national franchises, we actually committed, the Commission committed that we would address their issues within the next 6 months, and we hadn't actually sought notice on applying the changes that we were talking about making to section 621 to them originally, and I didn't think we had the legal notice to actually apply the rules to them, so we immediately sought that notice, and we will make a determination. We tentatively concluded that we will extend it to them, and we will within the next 6 months.

Mr. BARTON. Commissioner McDowell, had you not recused yourself, is it a fair statement to say that you would not have voted to impose some of the restrictions on the AT&T-Southwestern Bell merger that were imposed?

Mr. MCDOWELL. Congressman, because I did not look at the record, I have not even read the order or the statements, I don't know because I have not examined the record.

Mr. BARTON. All right, then I will ask Commissioner Copps and Commissioner Adelstein, the House voted against network neutrality provisions similar to the provisions that you two gentlemen required for the merger by an overwhelming vote. Do you think it is fair to impose those restrictions when the House had gone on record on opposite views to what you two gentlemen supported in the AT&T merger?

Mr. COPPS. I believe that the condition that was agreed to is a merger specific agreement with a company that controls 22 percent of the United States broadband facilities, has 12 million DSL customers in 22 States. This merger would accord significant new powers over the distribution of broadband, and I thought it was reasonable to be talking with them about getting assurances that the net-

works would be kept open. I think we came up with a very flexible and a very basic network neutrality outcome.

Mr. BARTON. Even though the House had expressed a dissimilar position?

Mr. COPPS. I repeat what I said. I think this was a merger that was—and a condition that was merger specific. I think we are constrained to look or charged to look at these things that range rather widely. When we are considering a merger, we are supposed to be concerned about the possibility of future harms, and if a merger does not meet the public interest balance test, we can consider ameliorative steps to deal with it, and I think that comes under our public interest authority and section 303 authority——

Mr. BARTON. Mr. Adelstein, I am about to run out of time and have to rush to the floor. What is your view on that?

Mr. ADELSTEIN. I think it is very important that we always defer to Congress. I looked very carefully at what the Congress did. Of course, what we ended up applying in the AT&T merger was not identical to what the Congress or the U.S. House voted on. At the same time, I do believe that it is important that we follow the law, and in this case, the law requires us, in the case of merger review, to apply a public interest standard. Here we were, creating the Nation's largest wireline, broadband and wireless provider all in one massive new package, and the question was whether or not the public interest was served by ensuring that those large networks remained open, and I thought ultimately they did. We were able to work it out in conjunction with the parties in such a way that they felt that they were able to conduct their business appropriately while adhering to that condition. Thank you.

Mr. BARTON. My last question, very quickly, Chairman Martin. I support your reverse auction provision on the Universal Service Fund reform, but I question the need for a Universal Service Fund in today's high tech society. Why do we need a Universal Service Fund when more people have cell phones than have hard line phones and there is no USF requirement at all for cell phones?

Mr. MARTIN. I think there are certainly some rural areas where the cost is extremely expensive to deploy infrastructure. I think one of the benefits of reverse auction is that it would allow us to lessen our reliance on Universal Service over time, and that would give us a sense of where we really need it and where we don't.

Mr. BARTON. Thank you, Mr. Chairman.

Mr. MARKEY. The hearing will be in recess for approximately 25 minutes.

[Recess.]

Mr. MARKEY. Thank you all very much. The subcommittee will reassemble, and the Chair will recognize the former Speaker, Dennis Hastert, to question the witnesses.

Mr. HASTERT. Thank you, Mr. Chairman. Yes, I wasn't 30 seconds late, but I ask to put my statement in the record, if that is possible.

Mr. MARKEY. Without objection.

Mr. HASTERT. Thank you very much. In reply to Mr. Stupak's comment a little while ago about a closed door meeting with the Republicans, I just have to say some Republicans weren't invited to that closed door meeting, so I don't know who all was in that,

but anyway, I would like to talk to Mr. Martin. Chairman Markey talked about this issue, intelligence agencies going into telecom companies and getting information.

I need to talk very carefully, and I want to say what I am saying is only what has been said in the open record, otherwise reprinted in newspapers, because I can't say everything, obviously, that I know. But when that decision was made to do that, eight members of the Congress, including the Senate and the House, Democrats and Republicans, were read into that program, and there was a question at the end, do you think we need legislative action to move forward with this, and it was unanimous, at that time, in that room, no, we don't.

There was legal ability to do that. So it is not like this thing just happened or somebody in the dark of the night with a bag over their shoulder went in there and started doing this. I have to tell you that this intelligence was probably one in every 15 billion phone calls. It targeted certain individuals overseas that were calling into this country and then the calls that were related to that, so I just want to say there should be a cautionary note on how you look at this and what the basis of it was. I hope you would take that under consideration. You don't really have to comment on that.

I would like to ask Commissioner Tate a couple things. I wrote the telecom act in Illinois in 1984, before we had PCs, cell phones, and all these things and one of the big issues was Universal Service, trying to keep Aunt Sally on the end of the line, so she could get her grocery calls and call her sisters, so Universal Service is an important thing.

When telephones kind of unbundled and competition came in, one of the main issues of that was to get away from the cross-subsidies because, for instance, AT&T, in my area, not only put in your telephone, they serviced it, they had long distance, they had local telephones, and there was a great cross-subsidy from some of those services that paid for other services, so back in the 1980s and I remember, most of you don't remember the 1980s, that was an issue.

So we constantly have kept a cross-subsidy issue in there. Do you agree that you should do away with cross-subsidies, that they should be taken out of the system and entities ought to stand on their own?

Ms. TATE. If I could be so bold as to say that we are going through this process right now with the joint board, and we are trying to kind of look at both short-term and longer term solutions, and I think that we should look at implicit type of subsidies and that there are just so many issues that we need to look at, and what I am trying to say is I am hoping to build a consensus across the joint board for us to make some recommendations to the full Commission.

Mr. HASTERT. Well, to make my point, and I only have a little bit of time, the basic issue of Universal Service, as we have it in the telephone act today, basically is a cross-subsidy. My district is an interesting district. I have the suburbs of Chicago and some of the—so there is really a lot of country. Actually, my suburban folks are paying for the subsidy to keep people connected out in the

country, and today, with the diversity of ways of getting information across wires and across the air, I am not sure there is a real issue out there and I think who is paying for what and what is fair and what is not fair, and we ought to take a look at that.

And finally, very quickly, Mr. Martin, can you respond whether you think that the decisions to what Commissioner Adelstein refers to as harmed or helped the competition when he talked about the AT&T-BellSouth merger. I really should ask Mr. Adelstein first, but I don't have the time. Are those helpful or those issues help create competition, or does it undercut competition?

Mr. MARTIN. I think I was certainly concerned with some of the conditions and whether they were really going to facilitate competition. I know I expressed my concern with some of the net neutrality requirements that were put forth and that they might actually undermine some of the incentives to invest in the underlying network infrastructure, so I am not sure that they actually helped, in that sense.

Mr. HASTERT. OK. Sorry, Mr. Adelstein, I have run out of time. I would like to have your report, too, but maybe I can get it some other way. Thank you, Mr. Chairman. I yield back.

Mr. MARKEY. Thank you. I thank the Speaker. The gentleman from New York, Mr. Engel.

Mr. ENGEL. Thank you, Mr. Chairman. I have a bunch of questions. I am going to try to go fast, and some of them have been touched on by other people, but in my opening statement I talked about DTV, and I had a bill before the last Congress addressing DTV consumer education, and in my opening statement I mentioned that in 2008, only $1.5 million was allocated for outreach, and I think that that is not significant, so I would like to ask the chairman, are you prepared to do what it takes to lead and coordinate a real robust consumer education campaign, and what do you intend to do besides the Web site? Are you going to implement programs like advertisements on buses and subways and things that are very visible so the American public knows what is really happening with DTV?

Mr. MARTIN. Well, I am certainly prepared to try to work with all the industries to make sure that they also are helping us put forth a vibrant consumer education campaign, and I met with some of the broadcasters and their proposals they put forth just in the last few weeks to try to educate consumers about it. The Commission has actually asked for money in the past, in our budgetary request and this year, as well. Last year we asked for some money, not even $1.5 million, for DTV education, and we actually didn't receive any funds for it.

This year we do have a request in there and we will use that to get the information as widespread as we can if we do get those resources. But I would also point out that it is not just the FCC that is a part of the Federal Government that is trying to educate consumers. And one of the reasons we didn't get money last year is NTIA has the primary responsibility for educating consumers about the DTV transition, and they actually have additional resources. So we have tried to work with them in making sure that we were coordinating with them and are doing everything we can to support them in their educational efforts.

Mr. ENGEL. Well, let me ask you, let me change and ask you about broadband penetration that Chairman Dingell sort of touched on some of this, but this committee is obviously committed to the acceleration of broadband deployment. The Commission recently ruled on streamlining the franchising process, and will this ruling accelerate the deployment of broadband? And let me throw in another one, Mr. Martin. In your recent testimony before the Senate Commerce Committee, you spoke of your interest in having the FCC assure that competitors have access to provide video service to apartments and condominiums and would give obviously a choice and probably lower prices to my constituents, who live in these multiple dwelling units. So I want to ask you about that, what authority does the Commission have to prevent future exclusive access agreements and enforcement of such existing agreements?

Mr. MARTIN. I think our efforts to make sure that competitors are able to deploy infrastructure to provide video is an important component of broadband penetration rights, as well. The ability to deploy infrastructure and provide services over those, including video services, is critical to making sure that they have the opportunity and the incentive to invest in the underlying infrastructure and recoup those investments. And there are several economic studies that were provided to the Commission in the record that said that actually one of the most important things you could do to help facilitate broadband investment is also making sure that that investment can be utilized to provide video services.

I think that that is not only in trying to streamline our franchise reform process that we did, but also as you mentioned, the MDU issue. It has got to be that consumers that live in apartment buildings have the same opportunity to have a choice of video providers as people who don't live in apartment buildings, and so I think we do have to make sure that those consumers aren't locked, so to speak, and have exclusive contracts that they are not able to end up having the same kind of opportunities, so I actually think the Commission needs to take action on that front, as well.

Mr. ENGEL. Thank you. Let me ask Mr. Adelstein a question. I mentioned, in my opening statement and I think the chairman also touched on it, our new governor, who was then attorney general, Eliot Spitzer, investigated alleged pay for play practices between major record labels and radio stations, and there were multi-million dollar settlements with several labels and two broadcasters, and last week, according to numerous press reports, the FCC reached a $12.5 million settlement with these groups. It included some FCC oversight and a separate airtime arrangement for local independent music, so I would like to ask you if you can comment on that, and has the Commission identified other broadcasters based on the Spitzer documents who might have engaged in similar practices, and does the Commission intend to investigate these, as well?

Mr. ADELSTEIN. Well, we are on the verge of an historic settlement on this issue. I would like to commend the leadership of our chairman, Chairman Martin, for working with us to really come up with a package that I think will hopefully take care of the payola issue for some time to come. It is historic in nature; it is com-

prehensive. It does only deal, however, as you noted, with four of the largest radio groups that were implicated. There are a number of other broadcasters who also, there is allegations in the Spitzer documents, have engaged in practices that may violate Commission rules, and I am hopeful, I have talked to the chairman, that we are going to investigate all of those, as well.

Mr. MARTIN. We will. The settlement that we have reached deals with the four largest. There are several others, as you indicated, at least, and we will deal with all of the broadcasters in a similar manner.

Mr. ENGEL. Thank you. And finally, one quick thing. We had testimony last week about the merger between XM and Sirius. I wonder if anyone would care to comment on that. The proponents of the merger say that satellite radio was just one part of entertainment, not in its own entity, and I am wondering if anyone feels they can comment. I know it has got to come before you, but I would be interested in hearing anyone's thoughts. I think that is a reasonable statement, by the way.

Mr. MARTIN. The applications haven't even been filed with the Commission yet, and I know we all review the record and review the applications when we get them.

Mr. ENGEL. OK. Thank you. Thank you.

Mr. DOYLE [presiding]. The gentleman's time has expired. The gentleman from California, Mr. Radanovich.

Mr. RADANOVICH. Thank you, Mr. Chairman. I was going to state how bad the traffic was on the GW Parkway this morning, and it was really, really bad. This always works for Cubin, so——

Mr. DOYLE. I ought to give you 30 more for that.

Mr. RADANOVICH. I have three questions. Just wanted to make sure that—and it should not need extra time, but would like to make sure that these get answered. And welcome to the committee. I really appreciate the fact that you are here. Chairman Martin, wireless telephony is an interstate device. It has flourished in a deregulatory environment and become a great example of a competitive market. It now appears that having to comply with many different sets of local and State regulations, although well-intentioned, is hindering the wireless service. I am wondering if you could comment on that, and should the FCC set certain Federal standards regarding wireless services to address this problem?

Mr. MARTIN. The Telecommunications Act tries to create a careful balance in which many of the wireless issues are done at the Federal level. States do have certain general consumer protection laws that still apply on the wireless side. There are petitions in front of us saying that some of the State laws that you have referenced have gone too far and gone beyond just general consumer protection laws and go towards the specific regulation of wireless prices, which would be something that would be in front of the FCC, not in front of State commissions.

And so we have pending petitions on it that the Commission hasn't acted on, and I think it is something that we have all struggled with. The only other insight I might have is that to the extent that the Commission did preempt some of the State actions, we would then be taking on the burden of establishing what would be

an appropriate regulatory framework from a consumer protection standpoint on the wireless side.

So I think that to the extent that we did act, that means that we would be saying what would be appropriate or inappropriate in terms of like early termination fees, which is one of the issues that is in front of us. And I think that that is something that we should make sure we are thinking through cautiously deciding because I think once you take on that responsibility, then it is a responsibility that we also craft what is an appropriate regulatory framework, as well.

Mr. RADANOVICH. Assuming that we both want a deregulated framework if it is the best for service for the consumer, there are a couple ways we could achieve that, I am sure, through the FCC or through bills passed by the Congress. In your view, do you think that is going to be necessary? Do you think the FCC can make it happen on their own?

Mr. MARTIN. I am not sure. Obviously, if Congress ends up acting to address this issue, that means that there isn't an issue in front of the Commission to decide anymore in this controversial issue, and I think whenever Congress can try to help clarify, provide guidance and clarify for us is helpful, so I always think that is a helpful thing on the contentious issues.

In the absence of congressional action, the Commission will try to determine is the current petition something that we should be addressing; is itwithin our jurisdiction or is it within the States? And I think it is something that is timely for us to go in and address. I had a joint meeting, actually, with the consumer interest groups, AARP, the Consumers Union, and the wireless industry just in the last few weeks, saying that if we are not able to come up with a joint resolution, it is probably time for the Commission just to decide this one way or another.

Mr. RADANOVICH. All right, thank you. My next question is for Commissioner McDowell. Welcome to the committee. Yesterday the NTIA issued rules for the converter box program, which was designed to help consumers who may want to continue using analog television with rabbit ears after the transition. At the same time, the Media Bureau recently denied waivers for some cable companies to seek to offer low-cost set-top boxes, which some might use with analog televisions after the transition. Does it make sense to help reduce costs for the small number of over-the-air consumers and then raise them for the much larger number of those using cable service?

Mr. MCDOWELL. Well, of course, those two types of set-top boxes are for different functions and different policy goals. The Commission, at the bureau level, has acted on some waiver requests to the separation ban, which, of course, Congress set up in 1996. The Commission, of course, a few years ago, invited companies to go ahead and file waiver requests, and many have done so, and we are, as a commission at the bureau level, are working on a number of those, and some have been denied at this point. I think where we all want to go, whether it is the cable industry or the consumer electronics industry or those of us at the Commission, would like to see downloadable security as the standard in the future, so whatever we can do to get there more quickly, the better.

Mr. RADANOVICH. So the Commission is open to making sure that the end result is the consumer gets that at the cheapest price possible, those that are being provided through the cable operators do afford that same type of attention, I would think, as well, right?

Mr. MCDOWELL. Correct. And there is a balancing here. There is low end set-top box waiver requests, as well. Those issues have not come up to what we call the eighth floor of the Commission level, at this point, but we will look at that more if it does.

Mr. RADANOVICH. OK, thank you. Mr. Chairman, may I ask unanimous consent for just one more question? It should only be a minute or two. OK, thank you, sir. Chairman Martin, can you please tell us what evidence the FCC has other than the Madison River issue of broadband operators blocking or degrading content on their networks, and given the lack of evidence, which I think you might find—I am giving you the whole question here—it seems that preemptive rules in this area are premature and could stifle innovation. What harm do you think would occur if Congress overreaches in this area of net neutrality?

Mr. MARTIN. Well, I certainly agree that we don't have any current evidence of there being any blocking capabilities and that rules and restrictions in the absence of evidence of particular harm could have an adverse impact on the ability and incentive for network operators to deploy additional infrastructure.

Mr. RADANOVICH. Perfect. Thank you. Thank you, Mr. Chairman.

Mr. DOYLE. The gentlelady from California, Mrs. Capps.

Mrs. CAPPS. Thank you, Mr. Chairman. Thank you, again, to the Commissioners, each of you, for coming. We waited a long time, I guess, and now we are really putting you through an ordeal of a long, long session, but it is an important one. As you know, Chairman Martin, the U.S. has been falling down in the world rankings in terms of broadband deployment.

This has been mentioned several times already today, that according to the International Telecommunications Union, we are now down to 21st in the world in terms of digital opportunity, whereas in 2001, we were in the top five. That is very remarkable. The part of this I wanted to ask is the fact that the FCC doesn't even have a good measure for which areas of the country have broadband. The Commission is still using a measure based on broadband availability to one customer in a ZIP code. It is deceptive on the face of it, because as you know, ZIP codes can be quite large geographic areas covering almost States, entire States, some of them.

And the fact that one household has cable broadband, say, on one edge of the ZIP code doesn't give everyone else who lives there the ability to get broadband. The GAO has sharply criticized this methodology in a 2006 study. My question to you is why hasn't the FCC done more to make sure it knows which areas need service? Does the fact that there is one broadband subscriber within an entire ZIP code mean that that ZIP code is being served? Mr. Martin.

Mr. MARTIN. No, it doesn't mean that the fact that one subscriber in an entire ZIP code being served doesn't mean that they are all being served, and actually, I agree with many of the concerns and have, when I was a Commissioner, spoken out about the concerns I have with the way we collect data on ZIP codes and the fact that

the speed of only 200 kilobits counting as broadband is insufficient with the technology changes. The Commission actually has, and they just adopted an order I circulated last fall, in September, that would do a notice of proposed rulemaking to ask how we change both of those issues. They were issues that I remember being debated when I was a staffer working for Commissioner Furchtgott-Roth when those standards were adopted in 1998 as being insufficient. That was one of the things he advocated at the time, and it was something that I think we should be changing, so it is something that Commissioner Copps and I have actually——

Mrs. CAPPS. I appreciate your concern. Why has it taken this long?

Mr. MARTIN. I can't describe exactly why I think it took the other Commissioners a little while to review the item. It took us a while to come up with the proposal once I became chairman, but I think this is something that we need to change.

Mrs. CAPPS. And just last September you even then began to question? How long had you been chairman, Mr. Martin?

Mr. MARTIN. I was chairman for a little over a year when I put that item forth, and when I came on board, I addressed some of the other issues that I thought were of the utmost importance: public safety, 911 on VOIP. We have several mergers that we were doing, and then in the spring of last year, I asked the Bureau to begin examining how we could reform our collection of data, and it is something that I think that actually I have had an ongoing dialog with the other Commissioners about that I think we all agree needs to be reformed.

Mrs. CAPPS. This is our watch. Well, let me follow up with another question. The FCC's measures are also inadequate in other ways, as you probably are aware. The fact that a few households have broadband access in a ZIP code doesn't mean that they even have access to the two most common pipes of DSL and cable. And your definition of broadband, just 200 kilobits a second downstream, doesn't make sense in a world where consumers in other countries have access to speeds that are 50 or even 100 times faster. So here is my follow-up question. Do you believe 200 kilobits a second is an effective measure of broadband?

Mr. MARTIN. No. And actually, the first thing I did when I was chairman, in our first year, we actually, for the first data collection, for the first time collected data on more than just 200 kilobits in five different tiers of speeds. That was the first thing that we did, and it was that collection of data that enabled us to put forth, in our Notice of Proposed Rulemaking, the fact that that was insufficient.

Mrs. CAPPS. OK.

Mr. MARTIN. So we did make changes the first year, and we are going to continue to make those changes.

Mrs. CAPPS. All right. I appreciate that. Let me give another side an opportunity to respond. Commissioner Copps, would you comment on the FCC's definition of broadband and statistics on deployment, and do you believe the FCC should keep statistics on broadband prices and penetration by socio-economic group?

Mr. COPPS. Just to put it in context of what we are actually talking about, if you were going to download a 90-minute movie from

a studio and you were proceeding 17½ hours to download that. If you were one of the lucky customers in Japan where you have up to 50 megabits, you could download that movie in 4 minutes. Just think about the difference there and what we are talking about.

Mrs. CAPPS. What do you think is taking so long? This is such an embarrassment.

Mr. COPPS. I don't know. We are 10 years, we are 10 years way too late. Just the differences in bandwidth. Even if we could measure the bandwidth we have right now, what are we going to do to get the strategy to get real bandwidth out there, so that we can be competitive?

Mrs. CAPPS. Let me ask you and/or Mr. Adelstein to follow up with something Mr. Stupak got into that is so important, about consumer protections like slamming and disclosure of consumer information that were lost for broadband providers after the FCC ruled it was governed by title I. Could you comment on this, if you feel like the topic has not been exhausted and the status of rulemaking on broadband consumer protection?

Mr. ADELSTEIN. When we issued the order that took broadband out of title II and all the protections for disabilities and consumers that involves and went to title I, we launched a Notice of Proposed Rulemaking, but we still haven't acted on a number of provisions. Very important questions are still out there and I think it is urgent that we act, and I appreciate the fact that the chairman said he was going to try to get that done within 6 months, I believe. I think it is incredibly urgent. I think it should have been done already, but I think we recognize the urgency of moving forward and making sure there are consumer protections that go forward into this title I world.

Mrs. CAPPS. Any other comments from you, Mr. Copps, on that issue, or do you think that is saying it sufficiently?

Mr. COPPS. Yes, ma'am.

Mrs. CAPPS. I have brought up fairly large topics. I have a little bit more than a minute. If any of the rest of you Commissioners I didn't get to would like to speak to the ways that we could get better statistics on deployment of broadband, I would appreciate any comment.

Mr. ADELSTEIN. I spoke with the chairman's office about just this, and I think we all benefit, and we all agree that we need more ways to slice and dice and gather that data and get more detail, so I think that will be to everyone's benefit and I think you probably have agreement that the more data we have in front of us, the better.

Mrs. CAPPS. I will yield back, Mr. Chairman, and with the comment that this, to me, underscores the fact that we ought to be meeting with these Commissioners much more often than we have.

Mr. DOYLE. I thank the gentlelady. Mr. Stearns.

Mr. STEARNS. Thank you, Mr. Chairman. Chairman Martin, I had the opportunity to write a letter to you on June 30, 2006. We urged the Commission and many of us had signed this letter and the letter urged the Commission to immediately commence its review and revision of the local radio ownership rules so that free, over-the-air local broadcast radio remained an important part of the new world of audio communications, and I guess my question

is just dealing with broadcast media ownership. I guess the industry is still operating under broadcast ownership restrictions that the courts have found invalid. Can the FCC justify any broadcast ownership restrictions? If so, when will we see them? I give you lots of latitude on this question, too.

Mr. MARTIN. The Commission did commence a review of the ownership rules last summer. We have committed to doing several public hearings around the country, and it is about 10 different studies on the various aspects of media ownership, and I am hopeful that we will be able to send back up to the Third Circuit, who overturned our other set of rules, you know, revisions to our media ownership rules. The industry is still operating under the rules prior to that decision, and those were rules that were put into effect previously and in the case of radio, for example, had been upheld. Those were not ones that had been overturned, and it was only the changes that got overturned, so the rules they were operating under were ones that were legal at the time.

Mr. STEARNS. OK. The second question is the FCC has classified broadband services over wire, cable and powerlines to be information services. I guess in the interest of parity, when will the Commission apply these same rules to wireless Internet access services?

Mr. MARTIN. There is an item pending before the Commission to do that. It has been for several months, and I notified the other Commissioners if we didn't end up adopting it before, we might do that at the next open meeting, which is next week.

Mr. STEARNS. Now, if anybody, other Commissioners would like to comment further on these questions, feel free to. Otherwise, I will just direct them to Mr. Martin and if anybody else would like to say anything dealing with that.

Mr. DOYLE. The Chair would note that we have three votes coming up. We are going to finish Mr. Stearns and Ms. Solis and Mr. Inslee, if possible, and then we will wrap up.

Mr. STEARNS. The third question, I guess again, for Chairman Martin is, in September 2005 the FCC classified DSL as an information service. Between June 2005 and June 2006 there was a 38 percent increase in DSL and fiber lines in the United States and a 58 percent increase in terms of overall U.S. broadband numbers. Where would we be if the FCC had not deregulated DSL?

Mr. MARTIN. Obviously, I don't know for sure where we would be, but I would say that I think that our provision of making sure that DSL was treated in the same regulatory manner as cable modem services and in a less regulatory manner, the information services, was critical to allowing and encouraging further DSL deployment and further DSL penetration. Prior to our implementation of that rule, cable subscribers to broadband, the cable companies were signing up customers 2 to 1 to DSL services and after we put those two services on equal footing, they have actually been subscribing 1 to 1.

So it has been more equal competition between cable and telephone companies in their deployment of broadband services since we deregulated telephone companies, put them on the same level playing field as cable companies, and I think that has been critical to fostering a competitive environment in which they have both

been able to rollout additional services and increase their penetration rates.

Mr. STEARNS. Yes. And for that, I think Congress compliments you, and I guess maybe a larger question, what could we do in the future to get even more competition for broadband deployment? Is there something like this that you think should be done and you might just give us some insight?

Mr. MARTIN. I mean, I think that the next, the other thing that is critical that I see on the immediate horizon, is making sure we are putting the same kind of regulatory environment in place for wireless services, which could be an additional platform. That is why it is critical that we go on and clarify, prior to the auction, that wireless broadband services are also subject to a less regulated set of rules, the information services rules, not telecommunications rules, and then we make sure we auction spectrum in such a manner that guarantees that consumers are going to receive the benefits of wireless broadband build-out.

The spectrum that we are going to be auctioning later this year is some spectrum the technical characteristics of which make it very unique in the capability of providing broadband services. So we want to make sure we are doing everything we can, from a regulatory standpoint, to make sure it can be an additional broadband competitive platform, and I think that is the most important thing I can see us doing in the very short run.

Mr. DOYLE. Gentleman's time has expired. Chair recognizes Mr. Inslee.

Mr. INSLEE. Thank you. I would like to ask you about white spaces, which might be the best thing in human evolution since the White Album, so we are really excited by this. We have heard at least three of the Commissioners express support for moving forward on white spaces, and we are happy about that. I would like to ask you to comment about your thoughts on extending this to portable devices, to extend this great work that is going on in white spaces to portable devices, presuming we can do this without interference, so if I could just ask you each to tell us if you support white space usage through portable devices and what circumstances? Thank you.

Mr. MARTIN. Yes, I support it as long as it is not creating interference with the current licensees. We actually just received our first piece of equipment for testing, that would be portable devices that could be utilized in the white space spectrum, earlier this week, I think it was yesterday, actually. And our labs will be undergoing testing. We anticipate we will be able to finish that testing by summer, by mid to late summer, and that will allow us to then finalize our rules for white spaces sometime in the fall.

Mr. INSLEE. I want to make sure Representative Solis can talk. Does anybody have anything to say sort of contrary to that view on the panel? I appreciate that. Is there any reason, assuming that we do show a lack of harmful interference, is there any reason that the Commission should delay sale and use of these devices until after the DTV transition, February 17, 2009? Is there any reason that we would want to delay that?

Mr. MARTIN. No. Once they have been able to go through our engineering labs and demonstrate that they are not going to create interference, then we wouldn't want to hold that up artificially.

Mr. INSLEE. Great. I would like to ask about media consolidation. My area of western Washington has been a real hotbed of interest in this, and we have talked to the Commissioner about potentially holding an official hearing to make sure that western Washington can weigh in on this issue. Have we made any progress on that? Is there any way I can work with you to get that going?

Mr. MARTIN. Obviously, we would be happy to continue to try to work with you to end up scheduling our hearings. We have three hearings left. I know we are going to try to do one in Tampa. We just announced yesterday that we are going to do a hearing in Tampa, that all the Commissioners had weighed in on as an appropriate place to end up doing it. There are several different requests from members of Congress to go back to your home State, to Illinois and to Chicago and a few other requests, as well.

Mr. INSLEE. I will look forward to that. That is a hopeful yes, thank you. I would like to yield to Congresswoman Solis.

Ms. SOLIS. Thank you. First of all, I would like to thank Commissioners Adelstein and Copps for coming to Los Angeles, my campus at USC, and having a hearing on media consolidation. I can't tell you how important it was to address those 200 to 300 people that came that wanted to hear exactly what was going on with media consolidation. So first of all, I just want to say thank you.

And I want to begin my questioning to Mr. Adelstein. I am very troubled by the 621 order passed by the Commission in December, mainly because I think it disadvantages low income and minority communities, and I would like to get your opinion, if you can explain your position on the FCC's limitation on build-out requirements in your 621 Order in the face of clear evidence that build-outs are critical to effective anti-redlining enforcement.

Mr. ADELSTEIN. Well, I was troubled by it, as well, because the law says that we can only limit build-out in terms of the time of the build-out. Section 621 of the Act clearly says that the only limitation that Congress placed upon the build-out is the time which they can build-out to all citizens of a community. I think our order went further. I think our order went further than the law allows us to do. Now, if Congress wants to tell us that we can limit build-out, that is another thing, but that is not what Congress said; that is what the FCC said. I think the result is not only unfortunate in terms of policy, but it could also result in us being overturned in court, which would create only more confusion and chaos and certainly not help broadband build-out.

Ms. SOLIS. Thank you. My next question is for Chairman Martin. Thank you, also, for being here. I understand from a recent study on female and minority ownership of broadcast stations, just 3 percent of those are licensed, full-powered television stations that is female and minority-owned and 5 percent or fewer than 5 percent are actually owned by women. In my opinion, the FCC has been grossly negligent in their efforts to address diversity in media ownership.

Most analyses of a la carte cable programming find that an a la carte regime would likely lead to a decrease in diversity and minor-

ity interest programming, particularly with programs like Vet, CTV, Lifetime Television, Oxygen Network, could be dramatically affected. Mr. Chairman, are you suggesting that programs targeting minorities and women have such little value that we should not care if they survive?

Mr. MARTIN. No, but I am suggesting that I think consumers should be able to control some of their own content that is coming into their homes and choose which channels they want to purchase, like they do in other markets, and indeed, the hundred percent rise in cable rates that has occurred over the last 10 years means that I think it is critical that the Commission and that policy makers talk about what is going on with the increasing cable prices.

Cable operators are saying that up to 40 to 50 percent of those increases are a direct result of content providers asking for increases in the amount that they are supposed to charge their consumers, and I think that if content providers want to provide that content for free, then they should be carried. But to the extent that they want to increase the charges that they were putting on end users, end users should be able to have some control over that when they are seeing their prices rise 10 and 15 percent every year.

Ms. SOLIS. Well, I understand the marketplace has a lot to do with the decisions that are made, but as I just reported, we have very few representations of women and minority owners in this media, in this spectrum, and I don't think that by making it more challenging for programming that actually shows the diversity of our country is going to help make any improvement. But my next question is, moving on to another aspect of diversity, I understand you have an Advisory Committee on Diversity for Communications in the Digital Age, which was established in 2003, to recommend practices to increase diversity. By its charter, the committee is required to meet at least two times a year. Is that correct?

Mr. MARTIN. I don't know, but I assume. I don't know how many times they are supposed to meet.

Ms. SOLIS. OK, you became chairman in 2005. Can you tell me how many times the Diversity Committee met in 2005?

Mr. MARTIN. No, I can't.

Ms. SOLIS. OK, it is my understanding, also, that the committee met formally December 10, 2004, then again by teleconference on April 25, 2006, and in person December 21, 2006. The committee was in violation of its charter in 2005, and in 2004 the committee adopted several recommendations. Looking at their Web site, I counted 20 recommendations from 2004, including several spectrum related resolutions. Can you tell us how many of the 2004 recommendations the Commission acted on?

Mr. MARTIN. The Commission actually hasn't acted on them, and I just recently proposed that the Commission take several steps that would act on some of them. For example, extending the opportunity time for construction permits for designated entities, allowing designated entities more easily get around what we call our debt and equity rule, which means that they would be able to more easily partner with the largest groups. And more importantly, I have been working with some of the consumer advocates on this area to try to say why don't we utilize the opportunity for broad-

casters to move from an analog to a digital world to allow them to lease some of their capacity to designated entities like minorities and women.

Ms. SOLIS. Can you please provide the committee with the information on those recommendations?

Mr. MARTIN. Absolutely. Those recommendations are all before the Commission.

Ms. SOLIS. Thank you, OK. My next question, before my time is up, I would like to direct to Commissioner Tate. Welcome, Commissioner. As one of the only women Commissioners on the FCC, I wanted to get your opinion about the portrayal of women on television, particularly in the Spanish language programming, as seen in the U.S., which is important and does not reflect, in many cases, our standards of what is appropriate. Does the FCC monitor the content of Spanish language television or Spanish language radio aimed at U.S. Hispanics, and specifically, how many Spanish language analysts, whose specific role is to monitor Spanish language TV and radio, does the FCC employ?

Ms. TATE. As you know, Congresswoman, we take complaints, and so we have a complaint driven process. It is not that we are monitoring or censoring any type of content or programming. I am not sure whether or not we have specific Spanish language speakers. I know that we do in our complaint area, but I will be glad to check and get back with you on that. And yes, I share your concerns about how women are portrayed across the media.

Ms. SOLIS. OK. And does the FCC have a process in place to review or assess its internal infrastructure that supports monitoring? I guess you kind of are not, to your knowledge are not aware of that or maybe Chairman Martin?

Mr. MARTIN. We don't have ongoing monitoring of content. What we do is respond to individual complaints that are filed, and in that context we do have translators who can help us for content that there are complaints about for Spanish language content.

Ms. SOLIS. Mr. Chairman, I would like to just submit the rest of my questions.

Mr. MARKEY. Without objection, I would ask the Commission to respond to those questions.

Ms. SOLIS. Thank you very much.

Mr. MARKEY. The gentlewoman from California's time has expired. We apologize to the members. There are now another series of roll calls on the House floor and this room is going to be used for another hearing immediately after the conclusion of this hearing, so we apologize to the members.

Mr. DOYLE. Will the chairman yield?

Mr. MARKEY. I would be glad to yield to the gentleman.

Mr. DOYLE. Yes, I just very briefly want to get on the record to piggyback on what Mr. Radanovich and Mr. Deal said with regard to the waiver request for cable set-top boxes. There are seven requests pending. Some have been sitting there over 200 days. This has the potential to save consumers hundreds of millions of dollars. I think this is something that the Commission should vote on, and I would ask the chairman of the Commission and all of the Commissioners to consider voting on the set-top boxes. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. With the thanks of the committee to the Commission, we appreciate the attention that you have paid to these issues. You can see that almost every member of the committee came and stayed and the level and intensity of interest is very, very high, and we will be inviting you back on a regular basis.

Mr. MARTIN. We will look forward to it.

Mr. MARKEY. But we thank you so much for your attention to our interests today.

Mr. MARTIN. Thank you, Mr. Chairman.

Mr. MARKEY. This hearing is adjourned.

[Whereupon, at 1:35 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

HENRY A. WAXMAN, CALIFORNIA
EDWARD J. MARKEY, MASSACHUSETTS
RICK BOUCHER, VIRGINIA
EDOLPHUS TOWNS, NEW YORK
FRANK PALLONE, JR., NEW JERSEY
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ONE HUNDRED TENTH CONGRESS

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Committee on Energy and Commerce
Washington, DC 20515–6115

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July 2, 2007

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Mr. Commissioner:

Thank you for appearing before the Subcommittee on Telecommunications and the Internet on Wednesday, March 14, 2007, at the hearing entitled "Oversight of the Federal Communications Commission." We appreciate the time and effort you gave as a witness before the Subcommittee.

Under the Rules of the Committee on Energy and Commerce, the hearing record remains open to permit Members to submit additional questions to the witnesses. Attached are questions directed to you from certain Members of the Committee. In preparing your answers to these questions, please address your response to the Members who have submitted the questions and include the text of the Member's question along with your response. Please begin the responses to each Member on a new page.

To facilitate the printing of the hearing record, your responses to these questions should be received no later than the close of business **Friday, July 13, 2007**. Your written responses should be delivered to **316 Ford House Office Building** and faxed to **202-225-5288** to the attention of David Vogel, Legislative Analyst/Clerk TI. An electronic version of your response should also be sent by e-mail to Mr. David Vogel at **david.vogel@mail.house.gov** in a single Word formatted document.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact David Vogel at (202) 226-2424.

Sincerely,

JOHN D. DINGELL
CHAIRMAN

Attachment

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Edward J. Markey, Chairman
Subcommittee on Telecommunications and the Internet

The Honorable Fred Upton, Ranking Member
Subcommittee on Telecommunications and the Internet

The Honorable Gene Green, Member
Subcommittee on Telecommunications and the Internet

The Honorable Anna G. Eshoo, Member
Subcommittee on Telecommunications and the Internet

Michael J. Copps
Commissioner

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

July 23, 2007

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find my responses to the additional questions for the record attached to your letter of July 2, 2007. I hope you will find them fully responsive to the interests of you and your colleagues.

Warm regards,

Mike

Michael J. Copps

Questions for the Record from The Honorable John D. Dingell
Chairman, House Committee on Energy and Commerce

Broadband Consumer Protection: While the Commission has reclassified several services as Title I rather than Title II or Title III services, it has yet to ensure that the consumer protection rules and regulations that applied to Title II and Title III services will apply to the reclassified broadband services. During the hearing, the Chairman indicated that the Commission would endeavor to complete the pending proceedings addressing these issues before the end of the year. Please identify each of the consumer protection rules or regulations you believe should apply to broadband services offered to consumers.

Let me start by reiterating my view that consigning broadband services to an indeterminate Title I regulatory limbo is no substitute for a genuine national broadband strategy. It does not afford consumers the kind of benefits, protections, and certainty that they are entitled to. Here is one example of the problem: a cutting edge device like the iPhone allows a user to communicate via IP-based Wi-Fi technology as well as via traditional CMRS service. Under our precedent, a consumer who uses the CMRS features of the device to place a phone call can be sure in the knowledge that our Title II CPNI rules require the carrier to protect his or her call and location information. But what happens when that very same consumer uses that very same device to call up a map of his or her location via a browser? Because we now classify this service as a Title I information service the carrier appears to be entirely free to sell off the customers' location information to the highest bidder. So in my view there is clearly work to be done when it comes to the Commission's consumer protection rules.

While it is true that we have clarified some of the questions about E911, CALEA, CPNI, and disabilities access, these clarifications generally are limited to issues involving interconnected VOIP service. Thus, there continues to be the need to address how many of the aforementioned rules should apply for broadband internet access services other than interconnected VOIP services, as well as consumer protections that include (1) prohibitions on telecommunications carriers from changing a subscriber's telephone service without authorization (commonly known as "slamming"); (2) prohibitions on placing unauthorized, misleading, or deceptive charges on telephone bills (commonly known as "cramming"); (3) truth-in-billing requirements; (4) protecting the freedom of the Internet; (5) requirements to report network outages to the FCC; (6) section 214 limitations on a telecommunication carrier's ability to unilaterally discontinue its service to customers; and (7) the applicability of section 254(g) rate averaging requirements.

Most of these issues were raised nearly two years ago in the Commission's 2005 Notice of Proposed Rulemaking on ensuring that consumer protection needs are met by all providers of broadband Internet access service. I believe it is in the best interest of American consumers for the Commission to expeditiously address these important questions of consumer protection in the broadband era.

Questions for the Record from The Honorable Gene Green
House Committee on Energy and Commerce

1. **Many of the large Silicon Valley search engine and web portal content providers who lobby for non-discrimination network neutrality rules say they want to prohibit network operators from offering faster service to certain content providers for a fee. However, it appears that many of these same content providers are already paying for faster service without any complaints. Instead of paying the network provider for faster service, they are paying companies like Akamai to position numerous local servers located around the country near the network providers last-mile networks to enable them to deliver their content faster than those who do not pay these server companies.**

   - **Is this kind of behavior legally distinguishable from network providers themselves offering faster service for a fee and acceptable to the individual Commissioners?**

I support the idea of Internet Freedom or net neutrality, which ensures that consumers of one Internet service provider will have non-discriminatory access to the customers and content served by every other Internet service provider. I also believe that in the coming years, the Commission should make enforcement of the basic principle of nondiscrimination one of its central goals for ensuring the openness of the Internet—just as it has traditionally done in its regulation of the Public Switched Telephone Network. In doing so, when there are claims of discrimination, the Commission should look on a case-by-case basis at what are often very fact specific situations regarding network architecture, network management and other business practices. Over time the Commission would develop a body of precedent that would guide our decision-making. The example you provide is one such fact specific scenario where the Commission could examine the facts and render an opinion. However, the Commission has not at present taken any action to determine whether the examples you suggest are legally distinguishable though it is my desire that the Commission undertake an analysis of cases such as this in the context of an enforceable rule of non-discrimination. I believe that a strong commitment to the principles of competition, non-discrimination and open and interconnected networks will ensure that America's consumers are able to take full advantage of the rapid pace of technological innovation and evolution.

2. **Another important factor to consider in network neutrality is peer-to-peer technology. Some analysts claim that peer-to-peer traffic, much of it arguably illegal file-sharing of copyrighted material, may take up over 50 percent of our current last-mile network capacity. Does FCC have any information on this?**

The Commission does not routinely collect information regarding the impact of peer-to-peer technology on the capacity of the Internet. However, a number of organizations recently filed comments with the FCC in the Broadband Industry Practices Notice of Inquiry concerning this issue. The Commission is in the process of analyzing all of the data provided to the FCC in this proceeding.

3 & 4. With the announcement and beta launch of a new service called "Joost" and their content deal with Viacom, we are close to a commercial launch of a peer-to-peer, full-screen, streaming TV quality video-over-the-internet service. Recently, one Google executive remarked that the Internet may not be able to handle this type of technology and that the Internet was not scalable to mass-use of full screen, TV-quality video.

Is our economic and regulatory framework for last-mile networks sustainable if a company can just buy some servers, connect to the Internet backbone and compete with cable television by only paying for content and not the cost of investing in residential networks? Has the Commission examined this new service and how does it and similar new video-over-the-Internet services such as movie downloads affect the network neutrality debate? Does the Commission think that the Internet is scalable for mass use on full-screen, streaming TV-quality video?

Questions regarding new technologies and services are just the type of issues that the FCC should be examining. With the leading experts in the telecommunications field at its disposal, the FCC should do more in terms of collecting and gathering data and teeing up option papers for Congress as legislators consider important policy questions like network neutrality. To my knowledge, at least one commenter in the Broadband Industry Practices Notice of Inquiry referenced the "Joost" service. However, the Commission has not to date taken a close look at the impact new services such as video-over-the Internet services might have on our economic and regulatory policies. I have long said that we need in this country a national broadband strategy and considering the impact of cutting edge technology on the future should be part of that strategy.

5. **I am concerned that fully implementing the CableCARD rules immediately for the lowest-cost boxes will increase costs for consumers. Section 629 of the Communications Act requires FCC to establish rules regarding the commercial availability of navigational devices, such as set-top boxes. In Section 629(c), Congress required FCC to decide any request for waiver of these rules within 90 days after an application is filed. FCC has waited more than six months to rule on several waiver requests and took over eight months to rule on one. FCC's Media Bureau has claimed it can ignore Congress' 90-day directive when it stated "requests for waiver for low-cost, limited-capability set-top boxes will not be considered under Section 629(c)." Will the Commission commit to having the full Commission decide all pending waiver requests within the timeframe set forth by Congress and to scheduling a prompt Commission vote on the one waiver that was denied at the Bureau level?**

Where an appropriate showing is made that a waiver request falls within the scope of Section 629(c), the Commission should act within the statutory timeframe set forth therein. Regarding the waiver denial to which I believe you are referring, it is currently before the full Commission for decision.

Questions for the Record from The Honorable Anna G. Eshoo
House Committee on Energy and Commerce

1. **I am concerned that FCC can repeal a congressionally enacted statute simply by failing to act on a forbearance petition. In other words, vital consumer protections and incentives for competition enacted by Congress can effectively be repealed simply by failure to act on a forbearance petition by a dominant carrier.**

   - **Does the Commission have any safeguards that require that a vote be taken on a forbearance petition? Can the Chairman just refuse to take a vote and have the petition be granted? Would you support a FCC procedural rule to require that an up-or-down vote be taken on all forbearance petitions within the statutory deadline?**

I have concerns about the existing forbearance process. If the Commission fails to act on a forbearance petition within the statutory time frame, it effectively hands the petitioning party the pen and permits it to rewrite the law. I believe Congress trusted the FCC to implement the law, but it did not tell us to delegate far-reaching policy changes to the companies that fall under our jurisdiction. I am not aware of any procedural rules that would require a vote to be taken within the time afforded for consideration of a forbearance petition. As a result, it is possible for a petition to reach the end of the statutory period without a Commission vote. I would be open to considering a rule requiring the FCC to vote on all forbearance petitions before they go into effect.

2. **The unfulfilled promise of the '96 Telecom Act was vigorous competition between the various Baby Bells in each other's traditional regions. Obviously, this type of competition rarely exists and the few remaining Bells only really compete against other modes of communication (cable, wireless, satellite, etc.). Why do you think Verizon and AT&T do not compete against each other for telephone or broadband access customers in the other company's regions? What are the barriers to entry that prevent such competition? Can any new entrant really hope to overcome those home field advantages?**

One of my overriding goals since I joined the Commission six years ago has been to promote competition in the communications marketplace as directed by the '96 Telecom Act. I believe, however, that due to a number of regulatory missteps in recent years to which I objected it has become increasingly difficult for new entrants to enter a market where they don't currently own local facilities, as the Bell Operating Companies do in their regions. For example, we see cable enter the broadband market because they own their cable infrastructure. That said, I am not satisfied that the current broadband market is sufficiently competitive. In the United States, 96 percent of consumer broadband is provided by either cable modem or DSL technology. This evidences the difficulty new entrants wanting to provide broadband services have today. This state of affairs has to change. Without greater competition throughout the United States, we consign too many

of our businesses to tough stakes in the global digital economy and too many of our students to learning on yesterday's technology.

3. **I am a strong supporter of public broadcasting, and I am pleased that these broadcasters are able to provide vital educational and informational programming for my constituents, including programming suited to children and adults of all ages and social and economic backgrounds. I believe it is critical as we move toward the Digital Television transition that viewers continue to have access to this programming over subscription video services including cable, satellite, and Internet Protocol (IP) video.**

   - **I understand that the large cable operators are carrying High Definition and multicast digital broadcast signals transmitted by public television stations pursuant to an agreement between cable and public broadcasters reached two years ago. Similarly, I understand that Verizon and the public broadcasters also have reached a strong digital broadcast carriage agreement. However, there are no comparable agreements with either DirecTV or Echostar, the nation's two principal satellite operators. Since direct broadcast satellite now accounts for 27 percent of multi-channel video programming subscribers, it is unacceptable that there is no agreement for carriage of public broadcast digital signals. The Commission has an open proceeding on this subject that has languished for over six years—when can we expect the Commission to bring a resolution to this issue?**

I agree that we should move to clarify satellite carriers' digital carriage requirements as quickly as possible. As you note, the issue has been before us for more than six years. Public broadcasters – and other broadcasters that depend on mandatory carriage – need certainty as we approach the end of analog broadcasting. In formulating such requirements, I will be guided by the directive in Section 338 of the Communications Act to impose requirements on satellite carriers that are "comparable" to those imposed on cable operators under Title VI. To the extent that the record needs to be updated to reflect advances in satellite capacity or other technical matters, we should take steps to do so immediately. In the interim, there is nothing preventing – and indeed I would welcome – digital carriage agreements between public broadcasters and one or both satellite operators.

4. **A public television station that serves my constituents, KCSM in San Mateo, was fined $15,000 for airing an episode of the Martin Scorsese documentary, The Blues, which contains interviews with blues singers using profanity. According to the station, the same episode aired 737 times across the country, but KCSM was the only station fined, apparently because it was the only station whose broadcast was viewed by someone offended enough to complain to FCC. Do you think it is fair to single out one broadcaster for punishment over the exact same program shown over 700 times nationwide? Is this a logical system of enforcement, and is it likely to lead to predictable outcomes for a station?**

I take seriously the Commission's statutory obligation to enforce the restrictions on broadcast indecency. At the same time, I recognize that we must be mindful of the First Amendment as well as Section 326 of the Communications Act, which prohibits the Commission from censoring or interfering with the free speech rights of broadcasters. Thus, while we must be vigilant in applying our indecency rules, we also must act with appropriate restraint. That was the balance I believe the Commission was attempting to strike by seeking forfeitures only against the station that had been the subject of a viewer complaint, rather than attempting to identify other stations that may have aired the program.

- **In the wake of FCC's fine against KCSM, the Commission declined to punish stations airing Saving Private Ryan even though the exact same language was used because deleting the words from the movie would have "diminished the ... realism" of the experience for viewers. Can you explain to me how the "realism" of dialogue from a fictional character in a theatrical movie is enhanced through coarse language while an actual person using the dialogue endemic to his culture is "gratuitous" in the eyes of the Commission?**

In reaching very difficult decisions like this, the FCC must consider the full context in which the broadcast material appears. This is critically important to an indecency analysis. Indeed, the Commission defines indecency as material that, *in context*, depicts or describes certain activities in terms patently offensive as measured by contemporary community standards for the broadcast medium. I believe that the Commission properly found that, in context, *Saving Private Ryan* was not indecent. Although the movie involved a fictional character, the events on which it was based were very real and deleting the words would have diminished that reality and the filmmaker's message about the horrors of war. While *The Blues* was a very difficult case, for the reasons set forth in the decision – including the fact that many of the expletives were not used by blues performers – I agreed with my colleagues that the material, in context, was actionable.

- **As a result of the Commission's confusing and unpredictable enforcement of its indecency rules, KCSM and other public TV stations are now posting disclaimers before broadcasting telecourses with renowned works of art containing nudity, or those with footage of aboriginal tribes. Self-censorship is also becoming more prevalent because there are no clear and definitive measures that broadcasters can use to determine if the programs they air are "indecent" and would subject them to a $325,000 fine. When will the Commission provide clear guidelines of what is indecent and what is not?**

The importance of context makes issuance of a set of "clear guidelines" difficult, since our decisions must take into account specific and often differing fact patterns. I have urged the Commission to provide as much guidance as possible in its decisions so that licensees can have a better sense of what is indecent and what is not. Such a "common law" approach may not provide immediate certainty, but it may be the best way to establish workable and sustainable rules of the road.

5. **As a Member of the Committee on Energy and Commerce, I have been an advocate for a vigorously competitive communications marketplace that is open to new entrants and innovation to ensure consumer choice and diversity of service offerings. I believe that where regulatory burdens or entrenched competitors stand in the way of such innovation and competition, it is the role of government to eliminate these hurdles as required by the public interest.**

   Section 7 of the Communications Act was enacted in 1984 to address those concerns. Most notably, Section 7 sought to eliminate regulatory obstacles to new services and technologies, by requiring FCC to encourage the development of new services. Section 7 also provides a presumption that new services are in the public interest, and places the burden on those who oppose a proposal for a new technology or service to demonstrate that the proposal is inconsistent with the public interest. The purpose of this provision is to prevent entrenched incumbents from effectively stalling competition through the regulatory process. The statute also requires the Commission to determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed.

   Since Section 7 of the Communications Act is so vital, I would like to get a better understanding of the Commission's efforts to effectively implement it.

   - **Do you believe that the one-year deadline imposed by Section 7 for a FCC decision on a petition or an application proposing a new service or technology supports the goals of promoting innovation and new services to the public, and providing additional competition in the marketplace?**

Among my highest priorities as a Commissioner has been to encourage new entrants into the communications marketplace, promote innovation and competition, and expand consumers' choices. I believe that providing timely regulatory answers to applicants seeking to provide genuinely new services and technology is essential to achieving these goals, and I believe that Section 7's one-year deadline keeps the Commission to a reasonable timeframe. Indeed, I would hope that in many cases we could exceed this deadline.

   - **In light of the Commission's internal goal of resolving telecommunications mergers within 180 days and the recent conclusion by a majority of the Commissioners that it is unreasonable for local cable franchising authorities to exceed more than 90 days in granting a competitive franchise for new video/broadband entrants, do you believe that Section 7's one-year deadline for a FCC decision on a petition or an application proposing a new service or technology is reasonable?**

As I noted above, I believe it is essential that the FCC provide industry with timely answers to regulatory uncertainties regarding new services and technologies. I certainly

believe that the FCC should be able to comply with the requirements of Section 7 within the one-year timeframe mandated by Congress.

- **Can you describe any past or pending petitions or applications where the Commission has in recent years affirmatively used the Section 7 requirement that opponents of a new technology or service have the burden of proof to demonstrate that such an application is inconsistent with the public interest?**

To my knowledge, the Commission in recent years has not expressly determined that under Section 7 the burden of proof is on the opponents of a new technology to show that the technology is inconsistent with the public interest. In one case filed in 1997, AirCell, Inc. filed a petition pursuant to Section 7 seeking a waiver of certain Commission rules to provide air-ground voice and data services. However, the Commission granted the waiver in 1998 without expressly invoking Section 7 or addressing the burden of proof issue.

- **Can you provide information on any opportunities in this coming year that will provide the Commission the wherewithal to exercise its Section 7 authority and due process obligation to approve of pending applications for new technologies or services?**

On September 1, 2006, M2Z Networks filed a forbearance petition with the Commission that implicates Section 7.

6. **Similar to the Committee Chairman and me, you have expressed concerns about protecting consumer access to the content of their choice -- something that has come to be known as Net Neutrality. Chairman Martin has criticized efforts to enact legislation to codify these protections, claiming the Commission has issued a policy statement providing consumer protections in this area.**

- **Do you believe the Commission policy statement is sufficient? How would an aggrieved consumer go about seeking redress for conduct that conflicted with the policy statement? What would it take for the Commission to alter or eliminate the policy statement?**

I believe that the Commission's Internet Policy Statement is a good start. In 2005, at my urging, the Commission adopted a public document that summarizes the basic rights of Internet end-users. The Internet Policy Statement states that consumers are entitled to: (1) access content; (2) run applications and services; (3) connect devices to the network; and (4) enjoy competition among network providers, application and service providers, and content providers. When the Policy Statement was adopted, there were questions about its enforceability. Then, with the giant mergers of SBC and AT&T, and Verizon and MCI, we saw the consolidation of last mile facilities with dominant players. Having the carriers voluntarily commit in the course of their mergers to make these rights enforceable advanced the efficacy of the Policy Statement. Last year, when AT&T

merged with BellSouth, the new company again committed to the enforceability of these four principles and also committed to abide by a fifth principle of non-discrimination. All of this suggests to me that at a minimum the FCC's four principles have become for the time being widely-accepted and it is my hope that the fifth principle will follow suit. An aggrieved consumer can file a complaint with the Commission seeking relief for violation of the Policy Statement or of a merger condition. However, some have expressed legitimate concerns as to the efficacy of this process as well as concerns with how easily the Commission could alter the policy statement. It is my hope that the FCC would act aggressively on any complaints that it receives in this regard but the Commission would benefit from additional guidance from Congress on these questions and in particular whether these principles should be codified into law or regulations.

Questions for the Record from The Honorable Jay Inslee
House Subcommittee on Telecommunications and the Internet

1. **Half of the television station news operations in the United States have a news partnership with a newspaper and those partnerships exist across market size according to the Television Newsroom Partnership Survey conducted by Ball State University in 2005. According to the Ball State Report, "news directors report their partnerships frequently perform many functions associated with convergence: cross-promotion of partner's content and some sharing of daily news lineups." If the concern is that the public interest can better be served through efficiencies and synergies of cooperation, repeal or modification of the newspaper cross-ownership ban is not necessary to achieve this goal. In light of this Ball State report, how would a relaxation of the newspaper cross-ownership rule achieve greater efficiencies than currently permissible, and if a relaxation did increase efficiency of operation, would it he in the public interest?**

Over the past six years, I have been in scores of media markets across this nation, trying to understand how various localities are faring under the tremendous consolidation that has overtaken America's media during the past decade. Most communities have become one newspaper towns. The vast majority of local television and radio markets are tight oligopolies, with a limited number of producers of local news. In this environment, add a merger between the monopoly newspaper and dominant television station and you get fewer reporters covering fewer beats, less diversity of opinion and a reduction in editorial voices. Merging newspapers and broadcast outlets may serve shareholder interests by reducing competition and cutting newsgathering costs. But far too often this comes at the expense of the public interest, because it strips to bare bones the amount of independently produced news available in a local community. Having less news, less newsgathering — and less local news, in particular—leaves us poorer as citizens, voters and as participants in community life. Thus, in reviewing the continuing merits of the cross-ownership ban, the FCC must be careful to distinguish between the economic interests of a company's shareholders and the broader interests of the public.

2. **Several FCC officials have stated that the Commission's newspaper cross-ownership rules <u>must</u> be relaxed in accordance with *Prometheus Radio Project v. Federal Communications Commission* holdings. The Chevron Doctrine limits the court's ability to interpret agency decision making. To uphold any agency interpretation, the court may only conclude that the agency's interpretation was permissible or reasonable given that agency's statutory authority. The court in *Prometheus* reliably followed this doctrine and held that FCC's analysis in the relaxation of the newspaper cross-ownership rule was a "reasoned analysis." The *Prometheus* court could have similarly determined that a FCC decision to maintain the newspaper cross-ownership ban would be well reasoned if supported by the record. Do you believe that the *Prometheus* holding binds FCC into relaxing the current cross-ownership rule? Does the Ball State Report or any other report studying the newspaper cross-ownership rule support**

maintaining the current ban?

I do not believe that the *Prometheus* holding requires the Commission to relax the newspaper/broadcast cross-ownership ban. Indeed, in the *Further Notice of Proposed Rulemaking* seeking comment on this issue on remand, the Commission sought comment on the ban without drawing any tentative conclusions or indicating that its discretion was limited in any way.

Questions for the Record from The Honorable Mike Doyle, Vice-Chairman House Subcommittee on Telecommunications and the Internet

1. **I understand that Verizon has filed a forbearance petition that affects local telephone competition in my district, covering Pittsburgh and surrounding communities. The Pennsylvania Public Utility Commission and Pennsylvania Office of Consumer Advocate both recently opposed the forbearance petitions on the grounds they will harm consumers by reducing choices and raising rates. Will you assure me that as you consider these petitions, you will not do anything that will reduce choices or raise rates for residents of Pittsburgh and the surrounding communities?**

Verizon's forbearance petition concerning their service in Pittsburgh is currently under review before the Commission and therefore I am limited in what I can say regarding its specifics. As a general statement, however, I have believed since the moment I joined the Commission six years ago that ensuring consumers have more competition and more choices must always be an important objective. Ensuring that consumers have affordable telecommunications services has also been among my highest priorities. These principles will certainly guide my thinking as I consider Verizon's petition as well as the many other petitions currently before me.

2. **A November 2006 GAO Report on special access found that those markets largely lack competition, recommended that the FCC develop a better definition of "effective competition" and recommended that the FCC monitor more closely the effect of competition in the marketplace. In public statements since, however, you have insisted that the market is competitive. What actions should the FCC intend to take in the wake of the GAO report's recommendations in the next 60 days?**

I am not aware of any public statements I have made to suggest that the special access market is competitive. Rather, I have repeatedly raised concerns regarding the apparent lack of competition that exists in the special access market. That is why I have said on numerous occasions that the FCC is long overdue to complete a review of its policies. In response to an inquiry by Chairman Markey, I said that I support completing this review and adopting any changes to our current rules that the Commission deems necessary to promote competition, choices and lower prices in the special access market no later than September 15, 2007. On July 9th, the Commission sought comments to refresh the record in the special access proceeding with a total comment period of 21 days from the date the notice is published in the Federal Register. While I believe that we currently have sufficient evidence in the record to complete this proceeding, I expect that the notice for comments in this time frame should still afford the Commission sufficient time to complete the special access proceeding by September 15th.

3. **What actions is the Commission taking to ensure reasonable rates, including wireless roaming rates, are enacted? Are these measures needed to ensure small, rural and regional carriers, who serve minority populations and people in remote areas, avoid exorbitant and discriminatory roaming rates?**

In 2005, the Commission initiated a rulemaking on wireless roaming. As I stated at the time, I believe the Commission's focus in this proceeding should be on protecting the interests of consumers, especially those in rural areas, who are often most reliant on roaming arrangements. One year ago, in my statement on the merger of Sprint Nextel and Nextel Partners, I expressed my hope that the Commission could move quickly to resolve these issues.

As the trade press has reported, the Chairman has recently circulated an item that will resolve this rulemaking. While I cannot comment on the merits of the decision before us, I look forward to working with my colleagues to develop a set of rules that will help and protect American consumers.

4. **Several CLECs have recently filed a petition at the FCC regarding the issue of copper retirement to clarify the FCC's rules, specifically to require the FCC to establish a formal process to determine whether it serves the public and national security interest to retire copper loops. What are your thoughts on this matter?**

Having redundant networks is an important part of ensuring the security of our communications system. Under the statute and under Commission rules, incumbent local exchange carriers seeking to retire copper loops must comply with FCC network modification disclosure requirements. While carriers should be permitted to update their network architecture, there is reason to be concerned that this process may reduce the availability of alternate network facilities in, among other places, federally owned and leased buildings. The Commission should consider reviewing its rules in order to ensure that under the guise of upgrading facilities, carriers do not sacrifice the safety and security that comes with having redundant networks. It also seems to me that we should be examining whether it serves the public interest to retire copper that has the potential to be utilized to provide competitive alternatives to new services. There are no simple solutions here and we must be mindful of the business implications of any decisions we make.

5. **It has come to my attention that fewer than 5% of licensed full-power television stations in the US are owned by women. Compared to the representation of women in other sectors of the business world, this is a disturbingly low number. It suggests that we have not done enough to diversify the ownership of our nation's number one source of local news and information. Are you interested in seeing more women own broadcast stations? If so, what have you done in your tenure to promote this goal?**

During my tenure at the FCC, I have been a strong advocate for trying to increase the dismal levels of female and minority broadcast ownership. Along with my colleague Commissioner Adelstein, I have participated in dozens of hearings across the country on the future of the media, and at each one we have discussed the critical implications of media consolidation for equal opportunity and diversity. Stemming the tide of media consolidation is directly related to preserving ownership opportunities for female and

minority broadcasters. I've also tried to increase those opportunities by strengthening our low power radio and television services. These small, community-based stations are typically far less expensive to own and operate than full-power stations and can be a way for new entrants, including women and minorities, to enter the marketplace. Third, I've pushed for strenuous enforcement of our broadcast Equal Employment Opportunities rules. As I stated when the Commission reviewed its EEO rules several years ago, I, for one, would be more than willing to impose strong and serious sanctions – up to and including revocation of licenses – for demonstrated lack of compliance.

But I do not want to sugarcoat where we are. Too often during my tenure – and over my vociferous objections – the FCC has been unwilling to address these issues in a serious and timely way. For instance, in 2004 the FCC's Diversity Advisory Committee proposed a wide array of recommendations to the FCC aimed at fostering the ability of women and minorities to participate in telecommunications and related industries. Unfortunately, those recommendations have largely been ignored. There has been no shortage of ideas over the years for addressing this issue. What's been lacking is a sustained commitment to get something done.

6. **I also understand from a recent study on female and minority ownership of broadcast stations that just 3% of licensed full-power television stations are owned by minorities. While minorities make up a third of the population, 3% is alarmingly low. What are you doing to update FCC data on the minority ownership of media and to find policy solutions that will allow more stations to be owned by minorities?**

See answer to #5, above.

7. **In a 2005 Wall Street Journal editorial, Chairman Martin stated that broadband providers are engaged in 'fierce competition'. However, according to the Commission's own reports 98% of the residential broadband market is dominated by regional cable-telecom duopolies. Do you consider a market where two companies have a 98% market share to be a competitive market? What have you done to promote competition in broadband in your time at the FCC?**

I am not satisfied that the current broadband market is sufficiently competitive. In the United States, as you note, the overwhelming share of consumer broadband is provided by either cable modem or DSL technology. If they are lucky, then, consumers have a choice between the cable and DSL duopoly. But too many lack even this choice and we are paying a heavy price for this low level of competition. Americans spend twice as much for broadband connections that are one-twentieth the speed of some countries in Asia and Europe. This state of affairs has to change. Without greater competition and a viable third broadband pipe, we consign too many of our businesses to tough stakes in the global digital economy and too many of our students to learning at dial-up speeds.

Since joining the Commission I have made bringing competitive broadband choices to all consumers one of my highest priorities. The Commission has at times gone in the

wrong direction over my objection as I believe it did when it reclassified broadband services as a Title I service. However, over the last six years, I have repeatedly pushed in both big and small ways for policies that promote broadband competition. For instance, I have for years repeatedly called for better FCC data gathering and a more granular analysis of how we are doing as a country when it comes to broadband. While it has come more slowly than I would have liked, the Commission earlier this year initiated inquiries into broadband data gathering and deployment, which I hope will enable the Commission to do a better job of promoting competition where it is so desperately needed. In the context of merger reviews, I have carefully considered the commitments made to promote broadband competition in assessing whether a merger serves the public interest. In addition, I have repeatedly advocated that in reforming our universal service system we should include broadband in future mechanisms, unless we want a digital gap that is wider in the 21st Century than it was in the 20th Century.

8. **One pending FCC investigation of particular importance deals with video news releases. Tens of thousands of Americans have written to the FCC urging that these news-like promotional videos be clearly labeled. Independent reports show that video news releases are routinely incorporated into news programming, without any disclosure to viewers. I understand that one study reports that an uncut news release aired on the 10:00 news in my own district. What is the agency's timeline for completing its video news release investigation? Given the impact on news programming viewed by millions of Americans daily, should the agency expedite its investigation? Is there a need for Congress to clarify the importance of full disclosure of video news releases?**

People in this country have a right to know where their news is coming from, but it's getting almost impossible to know. Everyone understands that a story cannot be judged without knowing its source, but increasingly the source goes unreported. I have pressed the Commission to thoroughly investigate each such case that is brought to its attention and to strenuously enforce its rules against inadequate sponsorship identification. I also note the Enforcement Bureau's issuance in the last year of dozens of Letters of Inquiry to determine whether the source of video news releases was properly disclosed. I have not yet seen the results of those investigations and would support expediting them in any way possible. Finally, I would welcome a clarification from Congress but believe that the FCC can and should take action even in the absence of further guidance.

Questions for the Record from The Honorable Nathan Deal
House Committee on Energy and Commerce

1. **Please outline the authorities you believe rest with the FCC when negotiations over retransmission consent break down and non-carriage occurs, depriving consumers' access to broadcast signals?**

I believe that we must judge the retransmission consent process not from the vantage point of companies, but from the vantage point of consumers. Since the great majority of negotiations are resolved without any disruption in service, the FCC's "good faith" requirements often are adequate to protect consumers' interests. However, if and when screens go dark in homes because big media companies are waging war over retransmission consent rights, consumers' interests change dramatically. Arbitration may sometimes be needed and the FCC should do everything it can to bring such cases to successful resolution.

2. **Do you think the current retransmission consent regime is currently designed such that it adversely affects small cable companies and small broadcast affiliates who may not have sufficient market power when negotiating with large broadcasters or multi-channel video program distributors (MVPDs)?**

I agree that disparities in market power can lead to disparities in negotiating leverage – whether it is a small broadcaster negotiating with a large cable operator or a small cable system negotiating with a large broadcast network. At bottom, the problem seems to stem from media concentration.

3. **Some have classified the current .retransmission consent regime as a "free market." How can they be considered "free market negotiations" when commercial broadcasters, who distribute their product free-of-charge over government provided spectrum, have out-dated statutory and regulatory advantages such as guaranteed carriage (must-carry), guaranteed placement on a must-buy broadcast tier, and non-duplication rules?**

I agree that this is not a textbook "free market" negotiation in which multiple sellers and buyers operate largely free of government involvement. Although the specific terms of the agreements are reached through private negotiation, the environment in which those negotiations take place is shaped by various federal statutes and regulatory requirements. Ultimately, I believe the issue is not whether those statutes and regulations are consistent with a hypothetical "free market," but whether they advance the government interests in localism, diversity, and competition.

4. **Do you believe that recent, unprecedented payments by cable operators to broadcasters for retransmission consent may result in higher bills for cable subscribers? When Congress passed the Cable Consumer Protection and Competition Act of 1992 giving commercial broadcasters retransmission consent rights, it was mindful of the effect these rights could have on the prices paid by cable and other MVPD subscribers. A provision was added that required the FCC, in implementing retransmission consent, to consider "the impact that the**

grant of retransmission consent may have on the rates for the basic service tier" and to ensure that retransmission consent does not "conflict with the Commission's obligation . . . to ensure that the rates for basic service are reasonable" (47 U.S.C. § 325(b)(3)(A)). Given the recent trend of cable operators being forced to pay for retransmission consent rights, what specific actions does the Commission intend to take to comply with its statutory requirement to ensure that retransmission consent does not conflict with your obligation to ensure that rates for basic service are reasonable?

I am committed to fulfilling our obligation to provide adequate rate regulation rules for the basic cable tier. In that regard, I am troubled by ever-rising cable rates and have been a strong proponent of improving our data-gathering and analysis to ensure that we understand what is driving rates higher. Retransmission consent costs should be a part of that comprehensive effort.

5. **Will you please recommend any legislative changes which you believe would improve the current retransmission consent regime?**

I do not have any specific recommendations at this time. If, however, we see more situations in which retransmission consent negotiations fail and a station is no longer carried, legislative action – or further Commission action – may be appropriate.

6. **What do you perceive would be the effect if Congress removed the requirement to include broadcast stations in the basic cable tier or allowed consumers to bypass the purchase of local TV signals when subscribing to a MVPD service?**

The cable carriage provisions of the Communications Act are premised on the importance of local broadcasting to advancing the goals of localism, diversity, and competition. A possible change such as the one described could have a harmful effect on less popular local broadcast stations. If, for example, less popular stations – especially those that rely on must-carry – could be placed on a tier with low penetration, they may not be able to attract enough viewers to survive economically. In any event, required placement of broadcast stations on the basic service tier is part of the broader set of rules that calibrates the relationship between broadcasters and multi-channel video service providers.

7. **Would granting MVPDs the right to negotiate with broadcast stations from neighboring designated market areas (DMAs) create a more free-market condition for negotiating retransmission consent as the local broadcast station would no longer have monopolistic powers?**

Granting such a right would certainly affect the negotiating leverage between MVPDs and broadcast stations. Such a change, however, should be considered in the context of the larger set of rules governing broadcast carriage rights and whether it would promote the goals of localism, diversity and competition.

8. **I understand that some would like to see the "white space" spectrum licensed and auctioned. Before the Senate Commerce, Science and Transportation Committee**

Chairman Martin outlined some concerns with that approach; I'd appreciate your thoughts on whether the spectrum should be licensed or unlicensed.

As I explained in my separate statement, I would have preferred that the Commission's October 2006 R&O and FNPRM in the "white spaces" docket have announced a rebuttable presumption in favor of unlicensed use. I reach this conclusion because, in many contexts – as with the enormously successful bands that support today's Wi-Fi networks – unlicensed uses most closely approach the ideal of the ***people's airwaves***, to be used in direct service of the public interest. That is why I have long supported freeing up additional unlicensed spectrum. With our recent AWS auction and the upcoming 700 MHz auction, we are opening up a huge swath of prime spectrum to ***licensed*** use – and it seems to me, on the present record, that the appropriate balance is to open up the TV white spaces to ***unlicensed*** use. So while I am more than happy to give careful consideration to the views of those who favor licensed use of the white spaces, I believe that stating a Commission presumption in favor of unlicensed use would provide the necessary clarity to innovators, entrepreneurs and the American people.

9. **Is it not true that an unlicensed approach will result in the efficient and timely use of the spectrum?**

For the reasons given above, I believe that an unlicensed approach will deliver the greatest benefits from this spectrum to the American people.

10. **Do the economic advantages and technical advances outweigh an inefficient and problematic auction of this spectrum?**

I believe that it would be quite difficult to fashion an auction of spectrum use rights that are, by definition, secondary to those of licensed broadcast users. This is particularly true when it concerns devices that are expected to use listen-before-talk and other advanced contention based protocols. Accordingly, I believe that the economic and technical benefits of unlicensed operation, as well as the difficulties of conducting an auction in this context, indicate that this spectrum band should be reserved for unlicensed use.

11. **Mr. Chairman, both small cable operators and rural telephone companies have expressed concern with the so-called "integration ban." As I understand the rule, cable operators are prohibited from offering set top boxes to their customers that include an integrated security function. These operators believe that rural customers may be forced to pay $2-3 more to lease a cable box, and rural telephone companies have stated that implementation of the ban "would serve as an additional barrier to the delivery of video services, and the extension of broadband services, to rural customers." Why is the integration ban necessary and how is it consistent with the Cable Consumer Protection and Competition Act of 1992? Would consumers save more money if the ban was waived for rural and non-rural service providers?**

In technological debates, I start from the premise that consumers are better served by having more choices and options. This is why I believe competition in the manufacturing

and distribution of consumer navigation devices can lead to greater innovation, lower prices and higher quality services. More importantly, Congress directed the FCC in Section 629 of the Communications Act to assure that consumers have the opportunity to purchase navigation devices from sources other than their multi-channel video programming distributor.

To this end, in 1998 the FCC concluded that cable operators should be prohibited as of a date certain from integrating navigation and security functionalities in set-top-boxes. In 2005, the Commission examined the lack of progress in the marketplace and determined that the integration ban should be retained, finding that without common reliance on the same security technology that consumer electronics manufacturers must rely upon, the FCC did not see a competitive market developing in a manner consistent with its statutory obligation. The FCC found that common reliance provides cable operators the incentive to devote their technical and business energies to ensuring that the system works. The Commission also considered the cable industry's assertion that the costs of the integration ban outweighed its benefits. The FCC found that the costs of the integration ban had to be counterbalanced against the consumer benefits of a more competitive, innovative and open supply market, and while there may be some short term costs, those costs were likely to decrease as technology advances and volume usage increases. In addition, the FCC took steps to minimize the cable industry's costs by deferring the effective date of the integration ban from 2006 to 2007 (after previously deferring the deadline from 2005 to 2006).

In 2006, the D.C. Circuit Court of Appeals upheld the integration ban against a petition for review filed by the cable industry. In upholding the FCC's 2005 Order, the court specifically accepted the Commission's reasoning underlying the ban as well as its conclusion that the costs of the ban did not outweigh its benefits. Now, after almost ten years of legal challenges and delay, it is time for the integration ban to go into effect. Consumers still do not enjoy the benefits of a thriving retail market for competing navigation devices as Congress directed in Section 629.

12. It is my understanding that the Commission has several petitions before it regarding pole attachment matters. Do you believe the Commission should act on these petitions, or do you believe the Commission should refrain from acting until Congress enacts appropriate Pole Attachment Act reforms?

While implementing pole attachment policy is one of the more technical issues the Commission faces, it is also essential to ensuring that we have a competitive broadband market. Unfortunately, I do not believe the Commission has done all it should in order to ensure that businesses have certainty about what the rules require and to welcome new entrants into the market for broadband services. I believe we owe the broadband over power line industry some certainty about how pole attachment rules will apply to them. I also believe we need to act in an expeditious fashion to resolve petitions before the agency that would clarify the rules that apply to competitive entrants into the wireline broadband market who seek to use poles and conduits owned by incumbent wireline providers. While the Commission would certainly benefit from any additional guidance

that Congress chose to provide on these matters, I believe the Commission can act on the petitions currently pending before it.

Questions for the Record from The Honorable George Radanovich
House Committee on Energy and Commerce

1. **The Media Bureau has taken well beyond the 90 days allotted by Congress to make a decision on waiver requests from the integrated box ban, The Comcast denial took 266 days. As of March 14, 2007, the same day all of the Commissioners testified before our Subcommittee, the Charter request had been pending for 243 days, the Verizon request for 218 days, the NCTA request for 210 days, the Armstrong Utilities request for 128 days, the Sunflower request for 114 days, the RCN request for 99 days, the Suddenlink request for 99 days, the San Bruno request for 90 days, the Liberty Cablevision request for 90 days, the NPG Cable request for 90 days, and finally the Bresnan request for 85 days. All of these pending requests are currently over the time limit given to the Commission by Congress. Don't all of you believe it is time for the full Commission to step in and take a vote on these requests, which are critical to consumers?**

The full Commission currently has one waiver request before us on review of a Media Bureau decision, which will permit us to provide additional guidance on this issue. In addition, the Media Bureau has acted on many more waiver requests since the March hearing – including many of those identified in your question. Any parties aggrieved by those decisions may, of course, file a petition for review with the full Commission.

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July 2, 2007

The Honorable Jonathan S. Adelstein
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Mr. Commissioner:

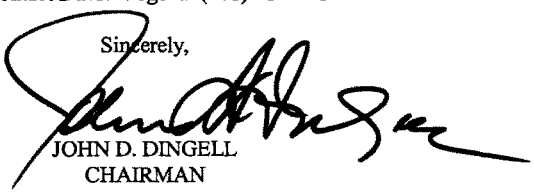
Thank you for appearing before the Subcommittee on Telecommunications and the Internet on Wednesday, March 14, 2007, at the hearing entitled "Oversight of the Federal Communications Commission." We appreciate the time and effort you gave as a witness before the Subcommittee.

Under the Rules of the Committee on Energy and Commerce, the hearing record remains open to permit Members to submit additional questions to the witnesses. Attached are questions directed to you from certain Members of the Committee. In preparing your answers to these questions, please address your response to the Members who have submitted the questions and include the text of the Member's question along with your response. Please begin the responses to each Member on a new page.

To facilitate the printing of the hearing record, your responses to these questions should be received no later than the close of business **Friday, July 13, 2007**. Your written responses should be delivered to **316 Ford House Office Building** and faxed to **202-225-5288** to the attention of David Vogel, Legislative Analyst/Clerk TI. An electronic version of your response should also be sent by e-mail to Mr. David Vogel at **david.vogel@mail.house.gov** in a single Word formatted document.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact David Vogel at (202) 226-2424.

Sincerely,



JOHN D. DINGELL
CHAIRMAN

Attachment

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Edward J. Markey, Chairman
Subcommittee on Telecommunications and the Internet

The Honorable Fred Upton, Ranking Member
Subcommittee on Telecommunications and the Internet

The Honorable Gene Green, Member
Subcommittee on Telecommunications and the Internet

The Honorable Anna G. Eshoo, Member
Subcommittee on Telecommunications and the Internet

Response of Jonathan S. Adelstein
Commissioner, Federal Communications Commission

Questions for Federal Communications Commission Members from
The Hon. John D. Dingell, Chairman,
House Committee on Energy and Commerce

July 23, 2007

The Honorable John D. Dingell

Question 1: While the Commission has reclassified several services as Title I rather than Title II or Title III services, it has yet to ensure that the consumer protection rules and regulations that applied to Title II and Title III services will apply to the reclassified broadband services. During the hearing, the Chairman indicated that the Commission would endeavor to complete the pending proceedings addressing these issues before the end of the year. Please identify each of the consumer protections rules or regulations you believe should apply to broadband services offered to consumers.

Consumers must be at the top of our list, not the bottom, as we move into the broadband era. Through the *Communications Act*, Congress codified a broad set of consumer protection obligations for telecommunications services that the FCC has now side-stepped with its current approach to broadband services. It is regrettable that, two years after exercising the blunt instrument of reclassification, the Commission has not significantly advanced the discussion of safeguards for broadband consumers, even though we have an open docket concerning *Consumer Protection in the Broadband Age.*[1] The Commission must do more to assess the experiences and expectations of broadband consumers, who deserve our attention.

In connecting American consumers with the latest technologies, we need to ensure that these consumers are afforded adequate protections, as well. Unfortunately, the Commission's legal approach has created a vacuum for consumers, leaving uncertainty over which consumer protection rules apply to broadband Internet access services and where consumers should turn for redress. For example, it is troubling that we might even temporarily roll back consumer privacy obligations during this age in which consumers' personal data is under greater attack than ever. Privacy concerns are not limited to the narrowband world. Consumers don't care whether their sensitive information is transferred by copper wire, fiber optic cable, a power line connection, or a wireless broadband link. They merely want us to implement and enforce the legal protections afforded by Congress.

The Commission should also act quickly to assess the effect of our decision on other vital safeguards, including our rules for Truth-in-Billing, slamming, cramming, access for persons with disabilities, the preservation and advancement of universal service, discontinuance, outage

[1] As I've consistently noted, the reclassification approach raises difficult questions about the legal and policy framework for broadband services. My underlying concern with that approach has always been that it takes the Commission outside the ambit of those core legal protections and grounding adopted by Congress. Given my view that the Commission should adopt a more consistent framework for cable and wireline broadband Internet services -- and with the Commission's course of action all but determined through the Brand X decision -- I believed it imperative that the Commission also take affirmative steps to protect consumers as it leveled regulatory disparities.

reporting, and rate averaging, which ensure that charges for consumers in rural areas are not higher than those for consumers in urban areas. Given the importance of Internet access to almost every aspect of consumers' lives, it is also critical that we work to preserve the open and neutral character that has been the hallmark of the Internet, maximizing its potential as a tool for economic opportunity, innovation, and so many forms of civic, democratic, and social participation. In addition, the Commission's approach here also affects the jurisdictional classification of broadband services, so we must explore the impact on our historical partnership with state commissions in safeguarding consumer welfare.

This is not to suggest that we regulate reflexively or append legacy approaches where they do not belong. It is imperative, however, that the FCC not remain silent, allowing consumers to push forward into the broadband age without taking stock of consumers' experiences and expectations, much less leaving them in a vortex of undefined roles and safeguards.

Instead, the FCC must actively investigate consumer protection issues. Reaching out to consumers -- whether through fora, consumer groups and advocates, conferences, or in partnership with state and local governments -- can only enhance our understanding of their needs and expectations. Although the Commission eventually heard an outcry over the abuse of telephone call records, we should not wait for a flood of consumer complaints. Similarly, having heard from an extraordinary number of consumers who are concerned about the future of the Internet, the Commission could do more to engage the public in a dialogue. The Commission has issued a five-page inquiry on broadband *industry* practices, but we should be actively engaging *consumers* about their practices, expectations, and opportunities, particularly as Internet users increasingly become producers, not just consumers, of content. In all these efforts, we must also recognize that time is critical, so that we do not continue to leave consumers in legal limbo.

Response of Jonathan S. Adelstein, Commissioner, FCC

The Honorable Gene Green

Question 1: Many of the large Silicon Valley search engine and web portal content providers who lobby for non-discrimination network neutrality rules say they want to prohibit network operators from offering faster service to certain content providers for a fee. However, it appears that many of these same content providers are already paying for a faster service without any complaints. Instead of paying the network provider for faster service, they are paying companies like Akamai to position numerous local servers around the country near the network providers last-mile networks, to enable them to deliver their content faster than those who do not pay these server companies.

Is this kind of offering legally distinguishable from network providers themselves offering faster service for a fee and acceptable to the individual Commissioners?

My understanding is that companies such as Akamai offer caching services designed to enhance access to their customers' Web content by transparently mirroring that content on computer servers.[2] The FCC has not directly considered the legal status of such services. The FCC has an open proceeding concerning broadband industry practices in which it sought information on "the behavior of broadband market participants today, including network platform providers, broadband Internet access service providers, other broadband transmission providers, Internet service providers, Internet backbone providers, content and application service providers, and others."[3]

Question 2: Another important factor to consider in network neutrality is peer-to-peer technology. Some analysts claim that peer-to-peer traffic, much of it arguably illegal file-sharing of copyrighted material, may take up over 50 percent of our current last mile network capacity. Does the FCC have any information on this?

The Commission does not routinely collect any data on the use and development of peer-to-peer technology. In response to the FCC's *Broadband Industry Practices NOI*, at least one commenter cited data indicating that "as much as 30 percent of downstream capacity" and "almost 70 percent of upstream traffic" can be consumed by peer-to-peer traffic,[4] although I do not know whether the FCC has independently attempted to verify this estimate. The Congressional Research Service also recently observed that peer-to-peer applications have been

[2] Akamai offers this description of its services: "Akamai has created a digital operating environment for the Web. Our global platform of thousands of specially-equipped servers helps the Internet withstand the crush of daily requests for rich, dynamic, and interactive content, transactions, and applications. When delivering on these requests, Akamai detects and avoids Internet problem spots and vulnerabilities, to ensure Websites perform optimally, media and software download flawlessly, and applications perform reliably." *See* www.akamai.com/html/about/index.html (visited July 13, 2007).

[3] *See Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52, FCC 07-31 (rel April 16, 2007).

[4] National Cable & Telecommunications Association Comments, WC Docket No. 02-52 at 28-29. See also NBC Comments, WC Docket No. 07-52 at 1-2.

used for illegal downloading of copyrighted materials but also for legitimate purposes and that it has been increasingly accepted by some mainstream content providers.[5]

Question 3-4: With the announcement and beta launch of a new service called "Joost" and their content deal with Viacom, we are close to a commercial launch of a peer-to-peer, full screen, streaming video-over-the-Internet service. Recently, one Google executive remarked that the Internet may not be able to handle this type of technology and that they Internet was not scalable to mass-use of full screen, TV quality video.

Is our economic and regulatory framework for last-mile networks sustainable if a company can just buy some servers connect to the Internet backbone, and compete with cable television by only paying for content and not the cost of investing in residential networks? Has the Commission examined this new service and how does it and similar new video-over-the-Internet services such as movie downloads affect the network neutrality debate? Does the Commission think that the Internet is scalable for mass use of full-screen, streaming TV-quality video?

The FCC has not formally examined the economic, regulatory, and technical aspects of Joost's video services. I note, however, that the FCC has an open proceeding concerning broadband industry practices in which it sought information on "the behavior of broadband market participants today, including network platform providers, broadband Internet access service providers, other broadband transmission providers, Internet service providers, Internet backbone providers, content and application service providers, and others."[6] Based on what I have heard from consumers, I believe that Americans view the Internet differently than they do other mediums. Consumers want to be able to choose an independent VoIP provider, or to be able to access video clips, and not just video programming from the largest media companies. Consumers don't want the Internet to become another version of TV, controlled by a handful of media conglomerates. The Internet has been a source of remarkable innovation and an engine for extraordinary economic growth and productivity, precisely because of its openness and diversity. It has fostered democracy and opened a new world of opportunities for those who have access – characteristics that we should seek to preserve.

Question 5: I am concerned that fully implementing the CableCARD rules immediately for the lowest-cost boxes will increase costs for consumers. Section 629 of the Communications Act requires FCC to establish rules regarding the commercial availability of navigational devices, such as set-top boxes. In Section 629(c), Congress required FCC to decide any request for waiver of these rules within 90 days after an application is filed. FCC has waited more than six months to rule on several waiver requests and took over eight months to rule one. FCC's Media Bureau has claimed it can ignore Congress' 90-day directive when it stated "requests for waiver for low-cost, limited capability set-up boxes will not be considered under Section 629(c)." Will the Commission commit to having the full Commission decide all pending waiver requests within the timeframe set forth by Congress

[5] *See* Goldfarb, Charles B., *Access to Broadband Networks*, CRS Report for Congress (June 29, 2006).

[6] *See Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52, FCC 07-31 (rel April 16, 2007).

and to scheduling a prompt Commission vote on the one waiver that was denied at the Bureau level?

I share your concerns. I believe that the Commission should decide all pending waiver requests within the statutory 90-day timeframe. Notwithstanding differences in legal opinion, the intent of Congress should be implemented. The only waiver petition that was denied by the Media Bureau – the petition filed by Comcast – is on circulation for consideration and vote by the full Commission.

Response of Jonathan S. Adelstein, Commissioner, FCC

The Honorable Anna G. Eshoo

Question 1: I am concerned that the FCC can repeal a congressionally enacted statute simply by failing to act on a forbearance petition. In other words, vital consumer protections and incentives for competition enacted by Congress can effectively be repealed simply by failure to act on a forbearance petition by a dominant carrier.

Does the Commission have any safeguards that require that a vote be taken on a forbearance petition? Can the Chairman just refuse to take a vote and have the petition be granted? Would you support a FCC procedural rule to require that an up-or-down vote be taken on all forbearance petitions within the statutory deadline?

I am not aware of any procedural safeguards that would require a vote to be taken on pending forbearance petitions, although I believe such a rule would be consistent with the Act and would promote consideration of the statutorily-mandated criteria for forbearance petitions.

Section 10 of the Act grants the Commission authority to forbear from enforcing all or a portion of the Title II of the Act and sets forth significant substantive standards upon which the Commission is to base forbearance decisions. Section 10(c) of the Act provides that a forbearance petition "shall be deemed granted if the Commission does not deny the petition" within one year, which can be extended by an additional 90 days.

In many forbearance proceedings, I have worked with my colleagues to support regulatory relief where the record reflects the development of competition. I am concerned, however, about the Commission's recent willingness to allow complex and controversial forbearance petitions to grant without issuing an order. Congress has given the Commission a powerful tool in our Section 10 forbearance authority, but the Commission must wield this tool responsibly. Allowing petitions to grant by operation of law, and without disclosing a shred of analysis, does not best serve the public interest. Moreover, this approach inappropriately ignores Congress's directive to consider the specific substantive standards set out in Section 10 and raises serious legal as well as constitutional questions about the scope, effect, and validity of its actions.

Question 2: The unfulfilled promise of the *'96 Telecom Act* was vigorous competition between the various Baby Bells in each other's traditional regions. Obviously, this type of competition rarely exists and the few remaining Bells only really compete against other modes of communication (cable, wireless, satellite, etc.). Why do you think Verizon and AT&T do not compete against each other for telephone or broadband access customers in the other company's regions? What are the barriers to entry that prevent such competition? Can any new entrant really hope to overcome those home field advantages?

I agree with you that the Commission must adopt policies that truly promote competition across telecommunications markets. The goal of the Telecommunications Act of 1996 is to establish a competitive and de-regulatory telecommunications environment. Over the past few years, the Commission has done much to reduce regulation by eliminating incumbent obligations, but the Commission can do much more to promote truly dynamic competitive

markets. Going forward, it is critical that the Commission improve its efforts to monitor market developments and to make decisions based on sound data and analysis.

I do not have information about why Verizon and AT&T have made particular business decisions but I agree that competition has not developed in the manner contemplated at the time the *1996 Telecommunications Act* was passed. Instead, we are faced with a time of great change in telecommunications markets, with seismic structural changes among market participants, as well as increased convergence and the emergence of new services.

For many residential customers, there is an emerging rivalry between traditional telephone providers and new cable entrants, along with an increasing opportunity for use of wireless and VoIP services. Nonetheless, many American consumers and small businesses do not have multiple options, and there are significant barriers to entry into these highly-concentrated markets.[7] These barriers include substantial fixed and sunk costs of building last-mile networks. Telecommunications and broadband networks also experience economies of scale, scope, and density that also raise entry barriers. I have been concerned about the adequacy and vigor of the Commission's analysis in its consideration of recent mergers and forbearance petitions. I believe that the Act contemplates more than just competition between a wireline and cable provider, so the Commission must continue to promote competition between providers and to be vigilant about the potential impacts of increased consolidation in these markets.

Question 3: I am a strong supporter of public broadcasting, and I am please that these broadcasters are able to provide vital educational and informational programming for my constituents, including programming suited to children and adults of all ages and social and economic backgrounds. I believe it is critical as we move toward the Digital Television transition that viewers continue to have access to this programming over subscription video services including cable, satellite, and Internet Protocol (IP) video.

- **I understand that the large cable operators are carrying High Definition and multicast digital broadcast signals transmitted by public television stations pursuant to an agreement between cable and public broadcasters reached two years ago. Similarly, I understand that Verizon and the public broadcasters also have reached a strong digital broadcast carriage agreement. However, there are no comparable agreements with either DirecTV or Echostar, the nation's two principal satellite operators. Since direct broadcast satellite now accounts for 27 percent of multichannel video programming subscribers, it is unacceptable that there is no agreement for carriage of public broadcast signals. The Commission has an open proceeding on this subject that has languished for over six years – when can we expect the Commission to bring a resolution to this issue?**

[7] For example, GAO recently raised concerns about the development of competition for business customers. In its report on special access services, GAO found that competitive providers are serving, on average, less than 6 percent of the buildings with demand for dedicated access, leaving 94 percent of the market served only by incumbent providers.

Response of Jonathan S. Adelstein, Commissioner, FCC

As a leading facilitator of the landmark agreement between the cable industry and public broadcasters, I believe we need to bring resolution to this issue in a manner similar to which we achieved in the cable context.

Public television stations have shown a real commitment to making the digital transition happen while serving the public interest. They were the first with real plans for how their multicast program streams could enrich and sustain the public, including new programs for children, teachers, seniors, non-English speakers, individuals with disabilities, and other underserved populations. Through local educational interactive services, increased local public affairs programming, including coverage state legislatures and local town meetings, and workplace development programs, it's easy to understand how these digital plans translate into benefits for the viewing public. Also, because public broadcasters do not share the same statutory retransmission consent rights as commercial broadcasters, the carriage of each of their program streams is a vital consideration for me.

Question 4: A public television station that serves my constituents, KCSM in San Mateo, was fined $15,000 for airing an episode of the Martin Scorsese documentary, *The Blues*, which contains interviews with blues singers using profanity. According to the station, the same episode aired 737 times across the country, but KCSM was the only station fined, apparently because it was the only whose broadcast was viewed by someone offended enough to complain to FCC. Do you think it is fair to single out one broadcaster for punishment over the exact same program shown over 700 times nationwide?

Is this a logical system of enforcement, and is it likely to lead to predictable outcomes for a station?

- **In the wake of the FCC's fine against KCSM, the Commission declined to punish stations airing *Saving Private Ryan* even though the exact same language was used because deleting the words from the movie would have "diminished the . . . realism" of the experience for viewers. Can you explain to me how the "realism" of dialogue from a fictional character in a theatrical movie is enhanced through coarse language while an actual person using the dialogue endemic to his culture is "gratuitous" in the eyes of the Commission?**

- **As a result of the Commission's confusing and unpredictable enforcement of its indecency rules, KCSM and other public TV stations are now posting disclaimers before broadcasting telecourses with renowned works of art containing nudity, or those with footage of aboriginal tribes. Self-censorship is also becoming more prevalent because there are no clear and definitive measures that broadcasters can use to determine if the program they air are "indecent" and would subject them to a $325,000 fine. When will the Commission provide clear guidelines of what is indecent and what is not?**

I share your concerns completely, and addressed them directly when I dissented with the Commission's decision regarding KCSM's airing of that episode of the Martin Scorsese-produced documentary. Specifically, I argued:

> The perilous course taken today is evident in the approach to the acclaimed Martin Scorsese documentary, "The Blues: Godfathers and Sons." It is clear from a common sense viewing of the program that coarse language is a part of the culture of the individuals being portrayed. To accurately reflect their viewpoint and emotions about blues music requires airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary. This contextual reasoning is consistent with our decisions in *Saving Private Ryan* and *Schindler's List*.
>
> The Commission has repeatedly reaffirmed, and the courts have consistently underscored, the importance of content *and* context. The majority's decision today dangerously departs from those precedents. It is certain to strike fear in the hearts of news and documentary makers, and broadcasters that air them, which could chill the future expression of constitutionally protected speech.

While I concurred in part and dissented in part with the Order overall, I pointed out that the Commission's new enforcement and fine policy simply didn't make sense.[8] I wrote:

> We have previously sought to identify all broadcasters who have aired indecent material and hold them accountable. In this Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was the subject of a viewer's complaint, even though we know millions of other Americans were exposed to the offending broadcast. I cannot find anywhere in the law that Congress told us to apply indecency regulations only to those stations against which a complaint was specifically lodged. The law requires us to prohibit the broadcast of indecent material, period. This means that we must enforce the law anywhere we determine it has been violated. It is willful blindness to decide, with respect to network broadcasts we know aired nationwide, that we will only enforce the law against the local station that happens to be the target of viewer complaints. How can we impose a fine solely on certain local broadcasters, despite having repeatedly said that the Commission applies a national indecency standard – not a local one?

Question 5: As a member of the Committee on Energy and Commerce, I have been an advocate for a vigorously competitive communications marketplace that is open to new entrants and innovation to ensure consumer choice and diversity of service offerings. I believe that where regulatory burdens or entrenched competitors stand in the way of such innovation and competition, it is the role of government to eliminate these hurdles as required by the public interest.

Section 7 of the *Communications Act* was enacted in 1984 to address these concerns. Most notably, Section 7 sought to eliminate regulatory obstacles to new services and technologies, by requiring FCC to encourage the development of new services. Section 7 also provides a

[8] You can find the complete statement at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-17A4.pdf

presumption that new services are in the public interest, and places the burden on those who oppose a proposal for new technology or service to demonstrate that the proposal is inconsistent with the public interest. The purpose of this provision is to prevent entrenched incumbents from effectively stalling competition through the regulatory process. The statute also requires the Commission to determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed.

Since Section 7 of the *Communications Act* is so vital, I would like to get a better understanding of the Commission's efforts to effectively implement it.

Do you believe that the one-year deadline imposed by Section 7 for a FCC decision on a petition or an application proposing a new service or technology supports the goals of promoting innovation and new services to the public, and providing additional competition in the marketplace?

Yes, I support efforts to minimize regulatory delay and uncertainty for providers of new services and technologies. In addition, the one-year deadline for considering petitions or applications for new technologies or services is mandated by Congress pursuant to Section 7 of the *Communications Act*, and I strongly believe we must adhere to all statutory mandates.

In light of the Commission's internal goal of resolving telecommunications mergers within 180 days and the recent conclusion by the majority of the Commissioners that it is unreasonable for local cable franchising authorities to exceed more than 90 days in granting a competitive franchise for new video/broadband entrants, do you believe that Section 7's one-year deadline for a FCC decision on a petition or an application proposing a new service or technology is reasonable?

As noted above, I support efforts to minimize regulatory delay and uncertainty for providers of new services and technologies. The one-year deadline for considering petitions or applications for new technologies or services is mandated by Congress. Accordingly, it does not appear that the Commission has discretion to adopt a different deadline, and it is certainly reasonable.

Can you describe any past or pending petitions or applications where the Commission has in recent years affirmatively used the Section 7 requirement that opponents of a new technology or service have the burden of proof to demonstrate that such an application is inconsistent with the public interest?

I am personally unaware of any instances, in recent years, in which the Commission has expressly used the Section 7(b) requirement to assign opponents of a new service or technology the burden to show that the technology is inconsistent with the public interest.[9]

[9] I note that the Commission relied on Section 7 to adopt a Policy Statement in which the Commission decided to consider applications and waiver requests associated with experiments on an expedited basis. *See Testing New Technologies*, Policy Statement, CC Docket No. 98-94, FCC 99-53 (Apr. 12, 1999).

Response of Jonathan S. Adelstein, Commissioner, FCC

Can you provide information on any opportunities in this coming year that will provide the Commission the wherewithal to exercise Section 7 authority and due process obligation to approve of pending applications for new technologies or services?

Because I do not control the agenda of the agency, it is difficult for me to comment on opportunities during the coming year in which the Commission will exercise Section 7 authority. I would note, however, that there are routinely a number of petitions and applications pending before the Commission for new technologies and services, particularly spectrum-based ones. I believe that the Commission should promptly address those petitions and applications and do so pursuant to its Section 7 authority, as appropriate.

Question 6: Similar to Committee Chairman and me, you have expressed concerns about protecting consumers access to the content of their choice – something that has come to be known as Net Neutrality. Chairman Martin has criticized efforts to enact legislation to codify these protections, claiming the Commission has issued a policy statement providing consumer protections in this area.

Do you believe the Commission policy statement is sufficient? How would an aggrieved consumer go about seeking redress for conduct that conflicted with the policy statement? What would it take for the Commission to alter or eliminate the policy statement?

The FCC's *Internet Policy Statement* was an important step but is not sufficient, by itself, to ensure the continued open and neutral Internet. It is far from clear that the FCC has adequate rules in place to ensure that broadband providers do not discriminate in their provision of Internet content, services, or applications. In August 2005, the FCC ruled that the Act's long-standing non-discrimination safeguards in Sections 201 and 202 no longer apply to wireline broadband Internet access services.[10] At the same time, as you noted, the Commission also adopted its *Internet Policy Statement* that outlines four principles to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet: (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers.[11] The Commission stated that it would incorporate these principles into its ongoing policymaking activities but it did not adopt rules in this regard.

Avenues for consumer redress and the Commission's authority to act if discrimination occurs can fairly be characterized as unclear. The Supreme Court, in the *Brand X* decision, suggested that the Commission has broad authority to "impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate

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[10] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No.02-33, FCC 05-150, Report and Order (Aug. 5, 2005).*

[11] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No.02-33, FCC 05-151, Policy Statement (Aug. 5, 2005).*

interstate and foreign communications."[12] It is noteworthy, however, that other courts have taken a narrow view of the Commission's ancillary authority. For example, in reviewing the Commission's authority to set rules related to the unauthorized copying and redistribution of digital programming, the D.C. Circuit has stated that "[the Commission's] position in this case amounts to the bare suggestion that it possesses plenary authority to act within a given area simply because Congress has endowed it with some authority to act in that area. We categorically reject that suggestion."[13] Given the importance of preserving the open character of the Internet, Congress may wish to provide a stronger legal foundation for Commission oversight.

[12] *National Cable & Telecommunications Association, et al. v. Brand X Internet Services, et al.*, No. 04-277, 125 S.Ct. 2688 (June 27, 2005).
[13] *American Library Association v. Federal Communications Commission*, No. 04-1037 (Mar. 15, 2005).

Response of Jonathan S. Adelstein, Commissioner, FCC

The Honorable Mike Doyle

Question 1: I understand that Verizon has filed a forbearance petition that affects local telephone competition in my district, covering Pittsburg and surrounding communities. The Pennsylvania Public Utility Commission and Pennsylvania Office of Consumer Advocate both recently opposed the forbearance petitions on the grounds that they will harm consumers by reducing choices and raising rates. Will you assure me that as you consider these petitions, you will not do anything that will reduce choices or raise rates for residents of Pittsburg and the surrounding communities?

Yes, I have consistently encouraged the Commission to adopt policies that truly promote competition across telecommunications markets, with the goal of increasing consumer choice, lowering rates, and promoting the adoption of new services. The goal of the Telecommunications Act of 1996 is to establish a competitive and de-regulatory telecommunications environment. Over the past few years, the Commission has done much to reduce regulation by eliminating incumbent obligations, but the Commission can do much more to promote truly dynamic competitive markets.

With respect to petitions for forbearance, Section 10 of the Act sets out the standards for Commission action. Under Section 10, the Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges, practices, classifications, or regulations are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. In making this determination, the Commission must also consider pursuant to Section 10(b) "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."

I have supported a number of forbearance petitions where the statutory criteria were met. In two recent proceedings, I have supported relief where there was especially strong evidence of competition between the incumbent cable and wireline provider. While I have been concerned with the analysis in these decisions and I believe that Act contemplates more than just competition between a wireline and cable provider, I believe that these Orders were clearly superior to an automatic grant of the underlying petitions. I have been concerned, however, about the Commission's recent willingness to allow complex and controversial forbearance petitions to grant without issuing an order. Congress has given the Commission a powerful tool in our Section 10 forbearance authority, but the Commission must wield this tool responsibly. Allowing petitions to grant by operation of law, and without disclosing a shred of analysis, does not best serve the public interest. I will carefully review the petition that you referenced to ensure that the standards set out by Congress in Section 10 are satisfied.

Question 2: A November 2006 GAO Report on special access found that those markets largely lack competition, recommended that the FCC develop a better definition of "effective competition" and recommended that the FCC monitor more closely the effect of competition in the marketplace. In public statements since, however, you have insisted that the market is competitive. What actions should the FCC intend to take in the wake the GAO report's recommendations in the next 60 days?

Response of Jonathan S. Adelstein, Commissioner, FCC

The Commission must closely examine the Government Accountability Office's (GAO) recommendations and move forward with its own pending proceeding on special access services because many business customers and wholesale carriers rely heavily on incumbent providers' special access services for their voice and high-speed connections. Independent wireless companies, satellite providers, rural companies, and long distance providers depend on access to incumbents' nearly ubiquitous network and services to connect their networks to other carriers. In addition, many small rural providers depend on these services to connect to the Internet backbone. As GAO found, alternative providers serve, on average, less than six percent of the buildings with demand for dedicated access, leaving 94 percent of the market served only by incumbent providers.

In particular, I agree with GAO's recommendations that the FCC must more closely monitor the effect of its rules and competition in the marketplace. GAO recommended that the FCC consider collecting additional data and developing additional measures to monitory competition on an ongoing basis that more accurately represents market developments and individual customer choice.

The GAO report should also give further impetus to move forward with the Commission's long-pending proceeding on special access services,[14] particularly with the upcoming auction for licenses in the 700 MHz band of spectrum fast approaching. The Commission has compiled a substantial record in its special access proceeding, in addition to the records compiled in the recent major wireline merger proceedings. Moreover, GAO's report on special access services also provides fresh evidence and motivation to address these issues as expeditiously and comprehensively as possible. I have committed, along with my colleagues, if possible, to complete that proceeding by September 15, 2007, which is within the time-frame you suggested.

Question 3: What actions is [sic] the Commission taking to ensure reasonable rates, including wireless roaming rates, are enacted? Are these measures needed to ensure small, rural and regional carriers, who serve minority populations and people in remote areas, avoid exorbitant and discriminatory roaming rates?

I am increasingly concerned with the competitiveness of the CMRS wholesale market. Whether in the context of mergers or other rulemakings, the Commission hears regularly from small and mid-size carriers who are increasingly frustrated with their inability to negotiate automatic roaming agreements with larger regional and nationwide carriers for the full range of CMRS services. I was pleased that we initiated a proceeding in August 2005 to explore all aspects of roaming and more specifically the effects that consolidation has on the ability of smaller carriers to negotiate access to larger networks. I am pleased that a proposed order adopting automatic roaming obligations was recently put on circulation for consideration and vote by the full Commission and I look forward to reviewing the details of that proposal.

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[14] In January 2005, in response to a petition filed by AT&T in 2002, the FCC initiated a Notice of Proposed Rulemaking, seeking comment on whether regulation of dedicated access services and on whether the Commission's pricing flexibility rules should be revised. *Special Access Rates for Price Cap Local Exchange Carriers, Order and Notice of Proposed Rulemaking, WC Docket 05-25, 20 FCCR 1994 (2005).*

Response of Jonathan S. Adelstein, Commissioner, FCC

Question 4: Several CLECs have recently filed a petition at the FCC regarding the issue of copper retirement to clarify the FCC's rules, specifically to require the FCC to establish a formal process to determine whether it serves the public and national security interest to retire copper loops. What are your thoughts on this matter?

Two currently pending petitions ask the Commission to investigate whether the retirement of copper facilities would lessen the redundant capabilities available for consumers, including federally owned and leased buildings.[15] These petitions argue that copper loop and subloop retirement eliminate network alternatives that might otherwise prove essential for network redundancy in the event of a homeland security crisis, natural disaster, or the recovery period after such events. The Commission has recognized the importance of redundant communications in several contexts.[16] Indeed, the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks found that failure of redundant pathways for communications traffic was one of three main problems that caused the majority of communications network interruptions.[17] The Commission has sought comment on these petitions, and I look forward to reviewing the record developed in response to these petitions.[18]

Question 5: It has come to my attention that fewer than 5% of licensed full-power television stations in the US are owned by women. Compared to the representation of women in other sectors of the business world, this is a disturbingly low number. It suggests that we have not done enough to diversify the ownership of our nation's number one source of local news and information. Are you interested I seeing more women own broadcast stations? If so, what have you done in your tenure to promote this goal?

Since I've joined the Commission in 2002, women and minority ownership of broadcast assets has been one of my most important issues of concern. I've invested a substantial amount of time and attention in improving the situation against great odds. I believe that the dearth of women and minority ownership in the U.S. is a national disgrace and it represents the failure to meet our statutory obligation to ensure diversity.

I've steadfastly opposed any attempt to relax the media ownership rules and thereby increase concentration which would only put media outlets further out of reach of women and minority groups. The Free Press studies which contain the statistics you reference found not only found that women and minority ownership of broadcast radio and TV stations are embarrassingly low, but also that there was more diverse ownership in less concentrated markets. So, there is an

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[15] *See Petition for a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement for Copper Loops and Copper Subloops, filed by XO Communications, LLC et al. (filed Jan. 18, 2007); Petition for Rulemaking and Clarification filed by BridgeCom International, Inc. et al., Policies and Rules Governing Retirement of Copper Loops By Incumbent Local Exchange Carriers (filed Jan. 18, 2007).*

[16] *See, e.g., United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, WC Docket No.06-10 , FCC 06-165, Memorandum Opinion and Order (rel. Nov. 7, 2006).*

[17] *See Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Notice of Proposed Rulemaking, EB Docket No. 06-119, App. B (rel. June 19, 2006).*

[18] *See Pleading Cycle Established For Comments On Petitions For Rulemaking And Clarification Regarding The Commission's Rules Applicable To Retirement Of Copper Loops And Copper Subloops, Public Notice, DA 07-209, Docket No. RM-11358 (2007).*

inverse correlation between the two. If we stem the tide of consolidation, that increases the chances of improving women and minority ownership.

As I see it, women and minority ownership is the litmus test of the media ownership proceeding. If we get women and minority ownership right, then our decision will be sustained by the 3rd Circuit, and garner support in Congress and among the American people. If we again ignore women and minority ownership, then our decision will again be overturned by the court, Congress and the American people.

Rather than staying in Washington, DC, I've visited dozens of cities and towns across the U.S., meeting and talking to diverse groups about media ownership and listening to their concerns. I've tried to educate the public, broadcasters and policymakers about the perils of maintaining the current state of women and minority ownership. I've learned that the American people too are very concerned, and they expect the FCC and Congress to act.

At the Commission and on Capitol Hill, I've advocated for, *inter alia*, the following: (1) the urgent reinstatement of the minority and women tax certificate program to help diversify ownership; (2) the need of the FCC to track and maintain such data on women and minority ownership and employment in a useful way for the academics to conduct meaningful studies; (3) the adoption of a "race neutral" term like SDB -- "socially and economically disadvantaged businesses," which would include women and members of minority groups; and (4) the need for the Commission to issue a Notice of Proposed Rulemaking that adequately addresses the concerns the Third Circuit raised relative to women and minority ownership.

Question 6: I also understand from a recent study on female and minority ownership of broadcast stations that just 3% of licensed full-power television stations are owned by minorities. While minorities make up a third of the population, 3% is alarmingly low. What are you doing to update FCC data on the minority ownership of media and to find policy solutions that will allow more stations to be owned by minorities.

I've advocated, unfortunately to no avail, for the FCC and/or NTIA to update federal data on minority ownership. The last comprehensive review of minority ownership was conducted by NTIA in 2000. Since then, scholars and economists have complained that FCC data on women and minority employment and ownership is so poor that is difficult to conduct truly robust economic analysis.

We should not forget that the FCC should promote of diversity not only because it is the right thing to do, but it is the law. Thirty-four percent of the nation's population owns less than one and a half percent of the asset value of this nation's broadcasting industry. That's inconsistent with the FCC's charter.

In terms of policy solutions, I've advocated for the FCC to meaningfully consider policy ideas of the National Association of Black Owned Broadcasters (NABOB), such as the use the "incubation" model, whereby a broadcast company could assist minority owned companies with management and financing, in exchange for regulatory relief in other areas. In addition to NABOB's ideas, we should examine the 14 policy recommendations of the Minority Media and Telecommunication Coalition., and the 17 recommendations of the FCC's Diversity Committee.

I will continue to urge the Chairman to act on these and other policy recommendations to improve the state of women and minority ownership. I am committed to this issue.

Question 7: In a 2005 Wall Street Journal editorial, Chairman Martin stated that broadband providers are engaged in `fierce competition'. However, according to the Commission's own reports 98% of the residential broadband market is dominated by regional cable-telecom duopolies. Do you consider a market where two companies have a 98% market share to be a competitive market? What have you done to promote competition in broadband in your time at the FCC?

Based on what we know, the current state of broadband competition, as the statistics you cite indicates, leaves much to be desired. It is difficult to assess the relative competitiveness of the current broadband services market because of the lack of sufficient data collected at the FCC and because the industry is changing so dramatically. Based on the available data, it appears that although we have made strides with broadband deployment, there are several areas of concern for policymakers: first, many consumers lack access to any affordable broadband options; second, the cable modem and telco broadband platforms account for 96% of the residential broadband marketplace; and, third, American consumers pay more for less bandwidth than citizens in other countries.

Unfortunately, the Commission's current efforts to gauge broadband deployment, competition, and affordability fall far short. In a May 2006 report, the GAO took the FCC to task for the quality of its broadband data. GAO criticized the Commission's ability to analyze who is getting broadband and where it is deployed, observing that the FCC's data "may not provide a highly accurate depiction of deployment of broadband infrastructures for residential service, especially in rural areas." Similarly, GAO observed that the number of providers reported in a Zip Code overstates the level of competition to individual households. One clear conclusion from the GAO's report is that the Commission must explore ways to develop greater granularity in its assessment and analysis of broadband availability, whether through statistical sampling, Census Bureau surveys, or other means.

As we look together at an increasingly global marketplace, we can all agree that we need a state-of-the-art telecommunications infrastructure that is second to none. I have worked hard to promote broadband and competition. In particular, I have urged that promoting the widespread deployment of affordable, higher-bandwidth broadband facilities must be a greater national priority than it is now. An issue of this importance to the economy of our nation and the success of our communities warrants a coherent, cohesive, and comprehensive national broadband strategy.

Even though we have made strides with broadband deployment, we must work to promote meaningful competition, as competition is the most effective driver of lower prices and innovation. I have supported efforts to even the regulatory playing field between broadband providers but there is more that this Commission can do to promote competition. This is increasingly important to ensure that the U.S. broadband market does not stagnate into a comfortable duopoly, a serious concern given that cable and DSL providers control approximately 96% of the residential broadband market.

While many simply talk about broadband deployment, I have been passionate about taking specific steps to drive actual broadband build-out. So when faced with the AT&T – BellSouth merger late last year, I worked closely with the applicants to come up with conditions for the merged company's holdings that will serve the public interest, consistent with my efforts to promote broadband deployment in other mergers and proceedings.

In addition to AT&T's commitment to provide broadband services to 100% of their territory by the end of 2007, we also made substantial additional progress toward increasing consumer access to wireless broadband. Most significantly, AT&T agreed to divest the licenses and leases it acquired in the 2.5 GHz band from BellSouth. This significant commitment will ensure that an independent broadband access provider – which turned out to be Clearwire – that is interested in developing services in the 2.5 GHz band will now have access to spectrum in an important part of the country that may otherwise have been unavailable. Increased 2.5 GHz availability in the southeast will lead to the deployment of wireless broadband services in this market in direct competition to the new AT&T – a real boon for consumers. And consumers in other markets will benefit as increased deployment in the southeast will continue to improve efficiencies for the entire 2.5 GHz industry.

I also was pleased that AT&T committed to jumpstart service in the under-used 2.3 GHz band by agreeing to a specific construction commitment over the next three years. AT&T already has conducted a number of successful trials on the spectrum and is running a commercial WIMAX network in Pahrump, Nevada. I want to see more deployment in the 2.3 GHz band. AT&T met my challenge by committing to a specific level of build-out by July 2010.

Similarly, I personally worked with Sprint and Nextel to secure significant build-out commitments from the companies for the deployment of services in the 2.5 GHz band in association with their merger. The companies provided a specific commitment to deploy to at least 30 million Americans. The infusion of capital into this market should stimulate product and service offerings that ultimately will benefit both the commercial and educational segments of the 2.5 GHz industry. Much like the AT&T merger, I am hopeful that this build-out commitment will prove a catalyst to the entire Wireless Communications Service. Like a rising tide that lifts all boats, AT&T's work in this band will be a boon for other wireless broadband providers looking to provide service in the 2.3 GHz band.

I want to underscore my belief that both the private and public sectors need to work together to place the U.S. back at the forefront of broadband rankings around the globe. Fortunately, we are a nation of innovators and entrepreneurs, and we have the resources to put us back at number 1, where we belong.

Question 8: One pending FCC investigation of particular importance deals with video news releases. Tens of thousands of Americans have written to the FCC urging that these news-like promotional videos be clearly labeled. Independent reports show that video news releases are routinely incorporated into news programming, without any disclosure to viewers. I understand that one study reports that an uncut news release aired on the 10:00 news in my own district. What is the agency's timeline for completing its video news releases investigation? Given the impact on news programming viewed by millions of

Response of Jonathan S. Adelstein, Commissioner, FCC

Americans daily, should the agency expedite its investigation? Is there a need for Congress to clarify the importance of full disclosure of video news releases?

The Commission's timeline is unclear. The first report by the Center for Media Democracy and Free Press was released in April 2006; and the second report was released in November 2006. The Commission launched its investigations related to first report on August 11, 2006. Another round of investigations, presumably related to the second VNR report, was launched on April 26, 2007. To date, the Commission has entered into approximately 50 tolling agreements with broadcasters who are identified in the report. Unfortunately, these tolling agreements have substantially reduced the incentive for the Commission to act and for the parties to engage in any meaningful negotiation. Given the impact of VNRs on news programming, and the impression broadcasters have inferred from the Commission's lack of action in this area, Congressional clarification and guidance on the importance of full disclosure would be helpful.

Response of Jonathan S. Adelstein, Commissioner, FCC

The Honorable Nathan Deal

Question 1: Please outline the authorities you believe rest with the FCC when negotiations over retransmission consent break down and non carriage occurs, depriving consumers' access to broadcast signals.

When retransmission consent negotiations break down, under section 325(b)(3)(C), the Commission has the authority to (1) prohibit a broadcast station that provides retransmission consent from engaging in an exclusive contract; and (2) prohibit a broadcast station from failing to negotiate in good faith. The Commission has the authority to collect a record and review an application that is filed pursuant to that section.

Question 2: Do you think the current retransmission consent regime is currently designed such that it adversely affects small cable companies and small broadcast affiliates who may not have sufficient market power when negotiating with large broadcasters or multi-channel video program distributors (MVPDs)?

Yes, the current retransmission consent regime and indeed that entire video marketplace seem to favor MVPDs and broadcasters with market power. This is principally, though not entirely, due to consolidation and vertical integration. The more subscribers a cable operator serves, and the more broadcast stations or non-broadcast networks a single entity owns, the greater leverage that entity can exercise during the negotiation process.

Of 531 national nonbroadcast networks, 116 networks are affiliated with a cable operator, 141 of the remaining networks are affiliated with broadcast television networks, broadcast television station owners and DIRECTV, and the remaining 274 networks, or 51.6 percent, are not affiliated with any cable operator or other media entity.[19]

Question 3: Some have classified the current the transmission consent regime as a "free market." How can they be considered "free market negotiations" when commercial broadcasters, who distribute their product-free-of-charge over government provided spectrum, bave out dated statutory and regulatory advantages such as guaranteed carriage (must carry), guarantee placement on must-buy broadcast tier, and non-duplication rules?

The current retransmission consent regime is not a free market, in the classic sense. It is a marketplace where the rules of the games were created by Congress and regulated by the Commission. In addition to retransmission consent and mandatory carriage, there are network non-duplication, syndicated exclusivity, and sports blackout rules, and the market modification process -- all government regulations that govern the video marketplace and the relationship between MVPDs and broadcasters.

Question 4: Do you believe that recent, unprecedented payments by cable operators to broadcasters for retransmission consent may result in higher bills for cable subscribers? When Congress passed the Cable Consumer Protection and Competition Act of 1992 giving

[19] Para 160, Twelfth Annual Video Competition Report (*2005 Report*), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-11A1.pdf.

commercial broadcasters retransmission consent rights, it was mindful of the effect these rights could have on the prices paid by cable and other MVPD subscribers. A provision was added that required the FCC, in implementing retransmission consent, to consider "the impact that the grant of retransmission consent...may have on the rates for the basic service tier" and to ensure that the rates for basic service are reasonable." (47 U.S.C. 325(b) (3) (A)). Given the recent trend of cable operators being forced to pay for retransmission consent rights, what specific actions does the Commission intend to take to comply with its statutory requirement to ensure that retransmission consent does not conflict with your obligation to ensure that rates for basic service are reasonable?

Retransmission consent may contribute the higher programming costs and therefore higher cable rates, but the Commission needs to develop a record and study this further. The Video Competition Report and the Cable Price Survey would be good vehicles to examine this issue in detail.

Question 5: Will you please recommend any legislative changes which you believe would improve the current retransmission consent regime?

It would be premature to suggest legislative changes at this time since the full Commission has yet to study this issue. The Media Bureau, at the direction the Chairman and pursuant to section 208 of Satellite Home Viewer Extension and Reauthorization Act of 2004, produced a report in September 2005 that broadly reviewed the retransmission consent regime. That report, however, does not represent a complete analysis or the view of the Commission. The Video Competition Report and the Cable Price Survey would be good vehicles to examine this issue in detail.

Question 6: What do you perceive would be the effect if Congress removed the requirement to include broadcast station in the basic cable tier or allowed consumers to bypass the purchase of local TV signals when subscribing to a MVPD service?

The effect of Congress removing the requirement to include broadcast stations on the basic tier or allowing customers to bypass the purchase of local TV signal when subscribing to a MVPD service is unclear, but it would likely be disruptive. While providing consumers with the option to buy or bypass the purchase of local broadcast channels would be consistent with an à la carte regime, the economic and behavioral impact of such a measure is difficult to assess with any degree of certainty.

Question 7: Would granting MVPDs the right to negotiate with broadcast stations from neighboring designated market areas (DMAs) create a more free-market condition for negotiating retransmission consent as the local broadcast station would no longer have monopolistic powers.

On its face, granting MVPD the right to negotiate with broadcast station from neighboring DMAs would create a more free market condition for negotiating cable carriage, but (as noted above) retransmission consent is just one of several rules that regulate the video marketplace and the relationship between cable operators and broadcasters.

Response of Jonathan S. Adelstein, Commissioner, FCC

Question 8: I understand that some would like to see the "white space" spectrum licensed and auctioned. Before the Senate Commerce, Science and Transportation Committee Martin outlined some concerns with that approach. I'd appreciate your thoughts on whether the spectrum should be licensed or unlicensed.

I have previously expressed my preference for use of unused broadcast television spectrum bands on an unlicensed basis. Unlicensed services, with their low barriers to entry, present such a great opportunity for the development of broadband offerings in communities across the country no matter their size or financial status.

Question 9: Is it not true that an unlicensed approach will result in the efficient and timely use of the spectrum?

The unlicensed, Wi-Fi movement has been one of the great telecommunications success stories over the past several years by enabling American consumers to offer and receive broadband services at the most local levels. Wherever I travel, I hear the calls for more unlicensed spectrum from operators who need more capacity to drive broadband deployment deeper and farther into all corners of the country. I have advocated continuing to explore the latest and most exciting cognitive radio and spectrum sensing technologies that are available to see how they can enable spectrum facilitation in the television bands. Of course, broadcasters have used the public spectrum for many years to serve rural and urban areas alike in providing news, civic information, education and entertainment. I believe we should continue to consider the unlicensed approach as an avenue for enabling the development of new and innovative technologies and services.

Question 10: Do the economic advantages and technical advantages outweigh an inefficient and problematic auction of this spectrum?

In October of last year, I supported the Commission's decision to take the first step towards allowing unlicensed, low-power devices to operate on vacant television channels. As I have stated, these unlicensed services, with their low barriers to entry, present a great opportunity for the development of broadband offerings in communities across the country. It is equally important, however, to ensure that harmful interference is not caused by the operation of unlicensed devices. Our course, a priority in evaluating the potential use of such spectrum will be to assess such interference issues.

Question 12: It is my understanding that the Commission has several petitions before it regarding pole attachment matters. Do you believe the Commission should act on these petitions, or do you believe the Commission should refrain from acting until Congress enacts appropriate Pole Attachment Act reforms?

The Commission has, in recent years, taken a number of actions designed to level the competitive playing field for facilities-based providers of broadband services.[20] A number of

[20] *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* CC Docket No.02-33, FCC 05-150, Report and Order (Aug. 5, 2005); *United Powerline Council's Petition for Declaratory*

parties have suggested that the Commission should also explore changes to its pole attachment rules in order to reduce competitive distortions among broadband providers.[21] These parties have asked the Commission to consider, among other things, changes to its rules for pole attachment rates, complaint processes, and procedures for providing access to poles, ducts, and conduits. The Commission has sought comment on two such petitions and comments have now been filed.[22] Given that access to poles, ducts, and conduits is critical for facilities-based providers of broadband services, I will give serious consideration to any recommendations that we might receive for handling of these petitions. While Congress directed the FCC to implement rules for pole attachments pursuant to Section 224, I welcome additional Congressional direction on these issues.

Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service, WC Docket No. 06-10, Memorandum Opinion and Order, 20 FCCR 13281 (2006).

[21] *See Petition of United States Telecom Association for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures*, RM-11293 (filed Oct. 2005); *Petition for Rulemaking of Fibertech Networks, LLC*, RM 11303 (filed Dec. 2005).

[22] *Id.*

Response of Jonathan S. Adelstein, Commissioner, FCC

The Honorable Mary Bono

Question 1: There has been some discussion of government mandating a la carte, which, at first blush, seems benign and consumer friendly; however, it is likely to do more harm than good. In my opinion, government mandated a la carte would bring less diversity and more regulation to the marketplace.

As you are aware, last Congress, this Committee marked up DTV legislation and video franchising legislation. Throughout the entire process, during both Subcommittee and Full Committee markups, not one Representative offered an amendment on a la carte. In the Senate, Senator McCain offered a watered down version of a la carte-which was defeated 20 to 2. Commissioner Adelstein – what is your opinion on government mandated a la carte and what impact do you feel it would have on the marketplace?

Greater choice for consumers has obvious appeal, so I remain open-minded. Cable rates and programming costs have skyrocketed in recent years. And while on a per-channel basis rates have remained virtually flat since 1998, overall rates have increased and consumers deserve relief. The findings of the overwhelming number of studies produced in this area (by academics, private industry, Wall Street analysts, third-party consultants and the FCC), suggest that, for a number of reasons, à la carte, as a consumer proposition, does not necessarily save customers money, and may harm the diversity of options available to viewers. Consumers may get some limited amount of choice, but they are likely to pay more to get fewer channels, according to these studies. That's the resounding consensus. Consequently, government mandated à la carte would be premature until consumer benefits are more clearly identified.

Response of Jonathan S. Adelstein, Commissioner, FCC

The Honorable George Radanovich

Question 1: The Media Bureau has taken well beyond the 90 days allotted by Congress to make a decision on waiver requests from the integrated box ban. The Comcast denial took 266 days. As of March 14, 2007, the same day all of the Commissioners testified before our Subcommittee, the Charter request had been pending for 243 days, the Verizon request for 218 days, the NCTA request for 210 days, the Armstrong Utilities request for 128 days, the Sunflower request for 114 days, the RCN request for 99 days, the Suddenlink request for 99 days, the San Buno request for 90 days, the Liberty Cablevision request for 90 days, the NPG Cable request for 90 days, and finally the Bresnan request for 85 days. All of these pending requests are currently over the time limit given to the Commission by Congress. Don't all of you believe it is time for the full Commission to step in and take a vote on these requests, which are critical to consumers?

At the direction of the Chairman, the Media Bureau has been designated to decide all waiver petitions based on delegated authority. To date, only one petition has been appealed to the full Commission, and that petition is on circulation and awaits final Commission vote. I believe the Commission should abide by all congressional deadlines even when there's a difference of legal opinion. Under the procedures of the Commission, there is no mechanism for individual commissioners, such as myself, to expedite the speed with which waiver requests are processed, although I have publicly condemned the delays and failure to meet statutory deadlines.

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ONE HUNDRED TENTH CONGRESS

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July 2, 2007

The Honorable Deborah Taylor Tate
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Madame Commissioner:

Thank you for appearing before the Subcommittee on Telecommunications and the Internet on Wednesday, March 14, 2007, at the hearing entitled "Oversight of the Federal Communications Commission." We appreciate the time and effort you gave as a witness before the Subcommittee.

Under the Rules of the Committee on Energy and Commerce, the hearing record remains open to permit Members to submit additional questions to the witnesses. Attached are questions directed to you from certain Members of the Committee. In preparing your answers to these questions, please address your response to the Members who have submitted the questions and include the text of the Member's question along with your response. Please begin the responses to each Member on a new page.

To facilitate the printing of the hearing record, your responses to these questions should be received no later than the close of business **Friday, July 13, 2007**. Your written responses should be delivered to **316 Ford House Office Building** and faxed to **202-225-5288** to the attention of David Vogel, Legislative Analyst/Clerk TI. An electronic version of your response should also be sent by e-mail to Mr. David Vogel at **david.vogel@mail.house.gov** in a single Word formatted document.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact David Vogel at (202) 226-2424.

Sincerely,

JOHN D. DINGELL
CHAIRMAN

Attachment

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Edward J. Markey, Chairman
Subcommittee on Telecommunications and the Internet

The Honorable Fred Upton, Ranking Member
Subcommittee on Telecommunications and the Internet

The Honorable Gene Green, Member
Subcommittee on Telecommunications and the Internet

The Honorable Anna G. Eshoo, Member
Subcommittee on Telecommunications and the Internet

Responses of

Commissioner Deborah Taylor Tate

Federal Communications Commission

To

Post-Hearing Questions for the Record

Hearing on
Oversight of the Federal Communications Commission

Subcommittee on Telecommunications and the Internet
Committee on Energy and Commerce
United States House of Representatives

The Honorable John D. Dingell

Broadband Consumer Protection

1. While the Commission has reclassified several services as Title I rather than Title II or Title III services, it has yet to ensure that the consumer protection rules and regulations that applied to Title II and Title III services will apply to the reclassified broadband services. During the hearing, the Chairman indicated that the Commission would endeavor to complete the pending proceedings addressing these issues before the end of the year. Please identify each of the consumer protections, rules or regulations you believe should apply to broadband services offered to consumers.

Answer: I understand the importance of rules and regulations designed to protect consumers. On four occasions, using its Title I authority, the Commission has extended certain Title II obligations to interconnected VoIP providers. On May 19, 2005, the Commission required interconnected VoIP providers to supply 911 emergency calling capabilities to their customers. On June 21, 2006, the Commission established universal service contribution obligations for interconnected VoIP providers. And, on March 13, 2007, the Commission extended customer proprietary network information (or CPNI) obligations to interconnected VoIP providers. Most recently, on June 15, 2007, the Commission extended the disability access requirements to providers of interconnected VoIP services and to manufacturers of specially designed equipment used to provide these services. The Commission also extended the Telecommunications Relay Services (TRS) requirements to providers of interconnected VoIP services, including requiring interconnected VoIP providers to offer 711 abbreviated dialing for access to relay services.

The Honorable Mike Doyle

1. I understand that Verizon has filed a forbearance petition that affects local telephone competition in my district, covering Pittsburgh and surrounding communities. The Pennsylvania Public Utility Commission and Pennsylvania Office of Consumer Advocate both recently opposed the forbearance petitions on the grounds they will harm consumers by reducing choices and raising rates. Will you assure me that as you consider these petitions, you will not do anything that will reduce choices or raise rates for residents of Pittsburgh and the surrounding communities?

Answer: Yes. Section 10 of the Communications Act requires that "the Commission shall forbear from applying any regulation or provision of this Act ... if the Commission determines that" enforcement of the provision is "not necessary" to ensure just and reasonable prices and practices or the protection of consumers, and that it serves the public interest.

2. A November 2006 GAO Report on special access found that those markets largely lack competition, recommended that the FCC develop a better definition of "effective competition" and recommended that the FCC monitor more closely the effect of competition in the marketplace. In public statements since, however, you have insisted that the market is competitive. What actions should the FCC intend to take in the wake of the GAO report's recommendations in the next 60 days?

Answer: In January 2005, the Commission adopted a *Special Access NPRM* taking a broad examination of price cap incumbent LEC special access services and rates. In response to the *Special Access NPRM*, the Commission received comments on June 13, 2005, and reply comments on July 29, 2005. Since these comments were filed, a number of developments in the industry may have affected parties' positions on the issues raised in the *Special Access NPRM*. These developments include a number of significant mergers and other industry consolidations; the continued expansion of intermodal competition in the market for telecommunications services, which affects the uses of, and competition to provide, a variety of special access services or alternatives; and the release by the GAO of a report summarizing its review of certain aspects of the market for special access services. On July 9, 2007, the Commission invited interested parties to update the record pertaining to the *Special Access NPRM*, which the Commission adopted in January 2005.

3. What actions is the Commission taking to ensure reasonable rates, including wireless roaming rates, are enacted? Are these measures needed to ensure small, rural and regional carriers, who serve minority populations and people in remote areas, avoid exorbitant and discriminatory roaming rates?

Answer: In August 2005, the Commission initiated a proceeding regarding roaming requirements applicable to Commercial Mobile Radio Service ("CMRS") providers. The record is extensive, with several segments of the CMRS industry represented. We currently have before us a draft item that addresses several of the concerns raised by carriers in the proceeding. Moreover, as Commissioner, I will continue to carry out the Congressional directive to promote the involvement of designated entities – *i.e.*, small businesses, rural telephone companies, and businesses owned by women and minorities – in the provision of spectrum-based services.

4. Several CLECs have recently filed a petition at the FCC regarding the issue of copper retirement to clarify the FCC's rules, specifically to require the FCC to establish a formal process to determine whether it serves the public and national security interest to retire copper loops. What are your thoughts on this matter?

Answer: When telephone companies upgrade loop facilities, often replacing copper facilities with fiber optic facilities, the Commission's rules establish a process permitting the telephone companies to "retire" the copper by disconnecting it from the network, or by removing it altogether. *See* 47 C.F.R. § 51.319(a)(3); 47 C.F.R. §§ 51.325-51.335. Several competing carriers filed a pair of petitions asking the Commission to modify these rules. I plan to carefully evaluate these petitions, including any value that modifying these rules might have on network redundancy. However, I am also mindful of the policies that led to the creation of these rules, including concerns about network management and investment incentives.

5. It has come to my attention that fewer than 5% of licensed full-power television stations in the US are owned by women. Compared to the representation of women in other sectors of the business world, this is a disturbingly low number. It suggests that we have not done enough to diversify the ownership of our nation's number one source of local news and information. Are you interested in seeing more women own broadcast stations? If so, what have you done in your tenure to promote this goal?

Answer: I share your concern about the low levels of broadcast station ownership by women and minorities, and I believe that the Commission should look for ways in which it can remove barriers to market entry, consistent with constitutional guidance from the Supreme Court. We at the FCC are attempting, through potential gender and race - neutral FCC rule changes, to facilitate women and minorities having access to and ownership of stations. For example, in auctions for new commercial broadcast authorizations, we provide a new media marketplace entrant a 25% or 35% auction bidding credit, depending upon the number of attributable interests the bidder has in other media. According to Commission records, in the 13 FM, AM, TV and LPTV auctions, bidders eligible for a new entrant bidding credit won a majority of the construction permits that were awarded, including some owned by women, by minorities or by women and minorities. This policy appears to be helping to make a positive difference in ownership diversity.

I was also pleased that Chairman Martin has rechartered the Advisory Committee on Diversity for Communications in the Digital Age through December 2008. The Committee has adopted a number of proposals that I believe we should seriously consider. Other ideas under consideration include possible revisions to the equity - debt plus (EDP) ownership attribution standard to assist qualified entities in obtaining and operating stations; allowing a qualified entity to lease digital spectrum for its programming from a television station; and allowing qualified entities additional time to construct their stations.

In addition, I am committed to using my time and efforts to champion the matter of diversity.

I have, and will continue to reach out to industry to work together with organizations such as the Minority Media & Telecommunications Council to spread the word of good business practices that can truly make a difference.

6. I also understand from a recent study on female and minority ownership of broadcast stations that just 3% of licensed full-power television stations are owned by minorities. While minorities make up a third of the population, 3% is alarmingly low. What are you doing to update FCC data on the minority ownership of media and to find policy solutions that will allow more stations to be owned by minorities?

Answer: The record compiled in our ongoing proceeding regarding our media ownership rules contains substantial data as to the current level of minority ownership of media. In addition, two of the academic studies that the Commission has directed to be conducted for that proceeding, examining the levels of such ownership and barriers to entry, will include similar data. I will endeavor to ensure that procedures are established to keep this data current on an ongoing basis. With regard to your inquiry concerning policy solutions, please see the Answer to Question 5, above.

7. In a 2005 Wall Street Journal editorial, Chairman Martin stated that broadband providers are engaged in 'fierce competition.' However, according to the Commission's own reports 98% of the residential broadband market is dominated by regional cable-telecom duopolies. Do you consider a market where two companies have a 98% market share to be a competitive market? What have you done to promote competition in broadband in your time at the FCC?

Answer: Currently, the broadband market is an emerging competitive market. Providers of voice, broadband and video services are increasingly competing in one another's markets. The Commission has taken a number of steps to enable the deployment of competing broadband platforms. The Commission has now adopted the same regulatory approach for broadband Internet access service provided over cable systems, telephone wires, power lines, and wireless platforms to help ensure a level playing field among competing platforms. Other steps include the first Advanced Wireless Services auction, which offered the largest amount of spectrum suitable for deploying wireless broadband ever made available in a single Commission auction. In addition, the Commission is considering how to structure the upcoming 700 MHz auction to best enable the further deployment of wireless broadband services and mobile video, especially to rural communities.

8. One pending FCC investigation of particular importance deals with video news releases. Tens of thousands of Americans have written to the FCC urging that these news-like promotional videos be clearly labeled. Independent reports show that video news releases are routinely incorporated into news programming, without any disclosure to viewers. I understand that one study reports that an uncut news release aired on the 10:00 news in my own district. What is the agency's timeline for completing its video news release investigation? Given the impact on news programming viewed by millions of Americans daily, should the agency expedite its investigation? Is there a need for Congress to clarify the importance of full disclosure of video news releases?

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Answer: In April 2005, the Commission released a Public Notice reminding broadcasters, cable operators and others of their disclosure requirements related to the airing of VNRs and expressing its intention to investigate potential violations and to take appropriate enforcement action. The Public Notice described and stressed the importance of the disclosure obligations contained in Sections 317 and 507 of the Act and 73.1212 and 76.1615 of the Rules. The Commission also solicited public comment regarding the airing of VNRs. I favor resolving this proceeding and the pending VNR investigations as expeditiously as possible.

The Honorable Gene Green

1. Many of the large Silicon Valley search engine and web portal content providers who lobby for non-discrimination network neutrality rules say they want to prohibit network operators from offering faster service to certain content providers for a few. However, it appears that many of these same content providers are already paying for faster service without any complaints. Instead of paying the network provider for faster service, they are paying companies like Akamai to position numerous local servers located around the country near the network providers last-mile networks, to enable them to deliver their content fast than those who do not pay these server companies.

- Is this kind of behavior legally distinguishable from network providers themselves offering faster service for a fee and acceptable to the individual Commissioners?

Answer: On August 5, 2005, the Commission adopted four principles in its *Internet Policy Statement* with the intent of ensuring that "broadband networks are widely deployed, *open*, affordable, and accessible to all consumers . . . ." I support the Commission's *Internet Policy Statement* and believe the Commission should establish competitively and technologically neutral policies that will foster investment in broadband networks and the development of new and innovative broadband applications and services.

On April 16, 2007, the Commission released a Notice of Inquiry of broadband industry practices. The proceeding is designed to enhance our understanding as to the behavior of broadband market participants, including network platform providers, broadband Internet access service providers, Internet backbone providers, and content and application providers. Noting the Internet Policy Statement, we sought specific information about the behavior of market participants. Thus, we inquired as to nature of the market for broadband services, whether network platform providers and others favor or disfavor particular content, how consumers are affected by such policies and whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers. We also sought specific examples of beneficial or harmful behavior and inquired whether any regulatory intervention is necessary. The record in that proceeding closed on July 16, 2007.

2. Another important factor to consider in network neutrality is peer-to-peer technology. Some analysts claim that peer-to-peer traffic, much of it arguably illegal file-sharing of copyrighted material, may take up over 50 percent of our current last-mile network capacity. Does FCC have any information on this?

Answer: While the FCC does not routinely collect this information, the Commission recently initiated a Notice of Inquiry seeking comment on broadband industry practices, including the practices of content providers, network operators, and other market participants. This inquiry will provide a convenient forum for such providers to tell us what is happening in the market and about their concerns, including the types of traffic concerns you raise.

3. With the announcement and beta launch of a new service called "Joost" and their content deal with Viacom, we are close to a commercial launch of a peer-to-peer, full screen, streaming TV-quality video-over-the-Internet service. Recently, one Google executive remarked that the Internet may not be able to handle this type of technology and that the Internet was not scalable to mass-use of full screen, TV-quality video.

4. Is our economic and regulatory framework for last-mile networks sustainable if a company can just buy some servers, connect to the Internet backbone, and compete with cable television by only paying for content and not the cost of investing in residential networks? Has the Commission examined this new service and how does it and similar new video-over-the-Internet services such as movie downloads after the network neutrality debate? Does the Commission think that the Internet is scalable for mass use of full-screen, streaming TV-quality video?

Answer: The Commission recently initiated a Notice of Inquiry seeking comment on broadband industry practices, including the practices of content providers, network operators, and other market participants. This inquiry will provide a convenient forum for such providers to tell us what is happening in the market and about their concerns, including the types of new services you describe.

5. I am concerned that fully implementing the CableCARD rules immediately for the lowest-cost boxes will increase costs for consumers. Section 629 of the Communications Act requires FCC to establish rules regarding the commercial availability of navigational devices, such as set-top boxes. In Section 629(c), Congress required FCC to decide any request for waiver of these rules within 90 days after an application is filed. FCC has waited more than six months to rule on several waiver requests and took over eight months to rule on one. FCC's Media Bureau has claimed it can ignore Congress' 90-day directive when it stated "requests for waiver for low-cost, limited-capability set-top boxes will not be considered under Section 629(c)." Will the Commission commit to having the full Commission decide all pending waiver requests within the timeframe set forth by Congress and to scheduling a prompt Commission vote on the one waiver that was denied at the Bureau level?

Answer: To date, the Media Bureau has acted on requests for waiver of the July 1, 2007, integration ban deadline filed by 149 parties, granting 136 requests and denying 13. I recognize the need of the industry to obtain further guidance in this area, and will endeavor to encourage action on any other waiver requests before us as expeditiously as possible.

The Honorable Anna G. Eshoo

1. I am concerned that FCC can repeal a congressionally enacted statute simply by failing to act on a forbearance petition. In other words, vital consumer protections and incentives for competition enacted by Congress can effectively be repealed simply by failure to act on a forbearance petition by a dominant carrier.

- Does the Commission have any safeguards that require that a vote be taken on a forbearance petition? Can the Chairman just refuse to take a vote and have the petition be granted? Would you support a FCC procedural rule to require that an up-or-down vote be taken on all forbearance petitions within the statutory deadline?

Answer: Section 10 of the Communications Act requires that "the Commission shall forbear from applying any regulation or provision of this Act ... if the Commission determines that" enforcement of the provision is "not necessary" to ensure just and reasonable prices and practices or the protection of consumers, and that it serves the public interest. Congress set forth in Section 10 of the Act that any carrier may petition the Commission for forbearance and "[a]ny petition shall be deemed granted if the Commission does not deny the petition ... within one year after the Commission receives it, unless the one-year period is extended by the Commission."

While it is preferable that a majority of the commissioners address the scope of the petition, as I interpret the Act, in the absence of a majority action by the Commission to either grant or deny, the presumption in the statute is that the petition is granted.

2. The unfulfilled promise of the *'96 Telecom Act* was vigorous competition between the various Baby Bells in each other's traditional regions. Obviously, this type of competition rarely exists and the few remaining Bells only really compete against other modes of communication (cable, wireless, satellite, etc.). Why do you think Verizon and AT&T do not compete against each other for telephone or broadband access customers in each other's regions? What are the barriers to entry that prevent such competition? Can any new entrant really hope to overcome those home field advantages?

Answer: Verizon and AT&T currently compete against each other for long distance, enterprise, and wireless customers. The broadband market is currently an emerging competitive market. Providers of voice, broadband and video services are increasingly competing in one another's markets. The Commission has taken a number of steps to enable the deployment of competing broadband platforms. The Commission has now adopted the same regulatory approach for broadband Internet access service provided over cable systems, telephone wires, power lines, and wireless platforms to help ensure a level playing field among competing platforms. Other steps include the first Advanced Wireless Services auction which offered the largest amount of spectrum suitable for deploying wireless broadband ever made available in a single Commission auction. In addition, the Commission is considering how to structure the upcoming 700 MHz auction to best enable the further deployment of wireless broadband services and mobile video, especially to rural communities.

3. I am a strong supporter of public broadcasting, and I am pleased that these broadcasters are able to provide vital educational and informational programming for my constituents, including programming suited to children and adults of all ages and social and economic backgrounds. I believe it is critical as we move toward the Digital Television transition that viewers continue to have access to this programming over subscription video services, including cable, satellite, and Internet Protocol (IP) video.

- I understand that the large cable operators are carrying High Definition and multicast digital broadcast signals transmitted by public television stations pursuant to an agreement between cable and public broadcasters reached two years ago. Similarly, I understand that Verizon and the public broadcasters also have reached a strong digital broadcast carriage agreement. However, there are no comparable agreements with either DirecTV or Echostar, the nation's principal satellite operators. Since direct broadcast satellite now accounts for 27 percent of multichannel video programming subscribers, it is unacceptable that there is no agreement for carriage of public broadcasting digital signals. The Commission has an open proceeding on this subject that has languished for over six years – when can we expect the Commission to bring a resolution to this issue?

Answer: I share your appreciation of the quality and variety of the service provided by public broadcasters and your desire that viewers continue to have access to their programming. For this reason, I was happy to learn that several large cable operators and Verizon have voluntarily negotiated digital carriage agreements with public broadcasters, and encourage DIRECTV and Echostar to do the same. The Commission first looked into the question of satellite broadcast carriage in CS Docket No. 00-96, its rulemaking that implemented the Satellite Home Viewer Improvement Act of 1999, and raised additional questions regarding carriage of digital signals in a 2001 Further Notice of Proposed Rulemaking that sought comment on issues related to both cable and satellite carriage requirements. In 2005, we implemented satellite carriage requirements for both analog and digital signals of stations in Alaska and Hawaii, as required by the Satellite Home Viewer and Reauthorization Act of 2004. I am committed to addressing the broader remaining issues in a timely manner.

4. A public television station that serves my constituents, KCSM in San Mateo, was fined $15,000 for airing an episode of the Martin Scorsese documentary, *The Blues*, which contains interviews with blues singers using profanity. According to the station, the same episode aired 737 times across the country, but KCSM was the only station fined, apparently because it was the only station whose broadcast was viewed by someone offended enough to complain to FCC. Do you think it is fair to single out one broadcaster for punishment over the exact same program shown over 700 times nationwide? Is this is a logical system of enforcement, and is it likely to lead to predictable outcomes for a station?

Answer: As you note, by a Notice released on March 15, 2006, the Commission disposed of a number of indecency complaints, including that filed against San Mateo County Community College District involving its March 2004 airing of the program "The Blues: Godfathers and Sons" over its Station KCSM-TV. Please note that, in accordance with the Communications Act, the Commission did not fine the KCSM-TV licensee for this broadcast; it only proposed a monetary forfeiture against it. The Commission cannot assess a forfeiture until it has considered

the licensee's May 5, 2006, response to the Notice. Because the Commission's Enforcement Bureau is reviewing that response, it would be inappropriate for me to comment on the merits of the case. However, I will attempt to respond to your particular inquiries to the extent that I may do so.

At the outset, in response to your question about why the Notice proposed a forfeiture for this broadcast only against San Mateo, I refer you to paragraph 86 of the Notice. There, the Commission explained that, "in the absence of complaints concerning the program filed by viewers of other stations, it is appropriate that we sanction only the licensee of the station whose viewers complained about that program." The Commission explained that its proposed limited action was consistent with the agency's commitment to an appropriately restrained indecency enforcement policy, taking into account the First Amendment and Section 326 of the Act, which prohibits the Commission from censoring program material or interfering with broadcasters' free speech rights.

- In the wake of FCC's fine against KCSM, the Commission declined to punish stations airing *Saving Private Ryan* even though the exact same language was used because deleting the words from the movie would have "diminished the...realism" of the experience of viewers. Can you explain to me how the "realism" of dialogue from a fictional character in a theatrical movie is enhanced through coarse language while an actual person using the dialogue endemic to his culture is "gratuitous" in the eyes of the Commission?

Answer: Again, because this case is a pending matter, it would be inappropriate for me to comment on the merits of the outstanding issues raised by the licensee in its response to the Notice, of which this is one. However, I refer you to the general discussion of our contextual analysis of allegedly indecent and profane broadcast material contained at paragraphs 13-19 of the Notice and the analysis of the specific material aired by San Mateo at paragraphs 74-82, the last of which distinguishes the Commission's analysis of KCSM-TV's broadcast of "The Blues" with that regarding the complained-of airing by other stations of the motion picture *Saving Private Ryan.*

- As a result of the Commission's confusing and unpredictable enforcement of its indecency rules, KCSM and other public TV stations are now posting disclaimers before broadcasting telecourses with renowned works of art containing nudity, or those with footage of aboriginal tribes. Self-censorship is also becoming more prevalent because there are no clear and definitive measures that broadcasters can use to determine if the programs they air are "indecent" and would subject them to a $325,000 fine. When will the Commission provide clear guidelines of what is indecent and what is not?

Answer: As noted at paragraph 7 of the Notice, the Commission chose to address numerous complaints involving a wide range of programs in that single document with the objective of providing broadcasters and others with an understanding of the boundaries of our indecency and profanity standards to apply to so that they can select appropriate programming to air. To the extent that stations offer warnings of potentially objectionable material in advance of its

broadcast, they will assist parents in making informed decisions concerning what programming they choose to allow their children to see.

5. As a member of the Committee on Energy and Commerce, I have been an advocate for a vigorously competitive communications marketplace that is open to new entrants and innovation to ensure consumer choice and diversity of service offerings. I believe that where regulatory burdens or entrenched competitors stand in the way of such innovation and competition, it is the role of government to eliminate these hurdles as required by the public interest.

Section 7 of the *Communications Act* was enacted in 1984 to address these concerns. Most notable, Section 7 sought to eliminate regulatory obstacles to new services and technologies, by requiring FCC to encourage the development of new services. Section 7 also provides a presumption that new services are in the public interest, and places the burden on those who oppose a proposal for a new technology or service to demonstrate that the proposal is inconsistent with the public interest. The purpose of this provision is to prevent entrenched incumbents from effectively stalling competition through the regulatory process. The statute also requires the Commission to determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed.

Since Section 7 of the *Communications Act* is so vital, I would like to get a better understanding of the Commission's efforts to effectively implement it.

- Do you believe that the one-year deadline imposed by Section 7 for a FCC decision on a petition or an application proposing a new service or technology supports the goals of promoting innovation and new services to the public, and providing additional competition in the marketplace?

Answer: Yes. Section 7(b) of the Act, 47 U.S.C. § 157(b), provides that "[t]he Commission shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such application or petition is filed." Further, "[i]f the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated."

- In light of the Commission's internal goal of resolving telecommunications mergers within 180 days and the recent conclusion by the majority of the Commissioners that it is unreasonable for local cable franchising authorities to exceed more than 90 days in granting a competitive franchise for new video/broadband entrants, do you believe that Section 7's one-year deadline for a FCC decision on a petition or an application proposing a new service or technology is reasonable?

Answer: Yes. Section 7(b) of the Act, 47 U.S.C. § 157(b), provides that "[t]he Commission shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such application or petition is filed." Further, "[i]f the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated."

- Can you describe any past or pending petitions or applications where the Commission has in recent years affirmatively used the Section 7 requirement that opponents of a new technology or service have the burden of proof to demonstrate that such an application is inconsistent with the public interest?

Answer: I am not aware of any past or pending petitions or applications where the Commission has in recent years affirmatively used the Section 7 requirement that opponents of a new technology or service have the burden of proof to demonstrate that such an application is inconsistent with the public interest.

- Can you provide information on any opportunities in this coming year that will provide the Commission the wherewithal to exercise its Section 7 authority and due process obligation to approve of pending applications for new technologies or services?

Answer: M2Z Networks, Inc. asserts that its application to construct and operate a nationwide broadband network in the 2155-2175 MHz spectrum band is "subject to the express terms of Section 7 of the Act, 47 U.S.C. § 157, including the presumption in favor of new technology and services set forth in Section 7(a) and the one-year deadline for Commission action set forth in Section 7(b)." *See* M2Z Networks, Inc. *Ex Parte* Response to Replies and Oppositions at 18 (filed April 16, 2007).

The Honorable Nathan Deal

1. Please outline the authorities you believe rest with the FCC when negotiations over retransmission consent break down and non carriage occurs, depriving consumers' access to broadcast signals?

Answer: The Commission has only limited authority to dictate the terms of agreements for retransmission consent. The Communications Act requires only that parties negotiate in good faith. In the past, the Commission has offered the expedited services of the Media Bureau to act as an arbitrator, but only if both parties to the negotiations consent.

2. Do you think the current retransmission consent regime is currently designed such that it adversely affects small cable companies and small broadcast affiliates who may not have sufficient market power when negotiating with large broadcasters or multichannel video program distributors (MVPDs)?

Answer: From the information before us, it appears that, since the Commission implemented its rules noted above, requiring that parties negotiate for retransmission consent in good faith, with few exceptions, the negotiations process has ultimately resulted in agreement by the parties. Should a party file a complaint alleging that the process is not working, the Media Bureau will review the matter and decide whether any action within the Commission's authority is warranted.

3. Some have classified the current retransmission consent regime as a "free market." How can they be considered "free market negotiations" when commercial broadcasters, who distribute their product free-of-charge over government provided spectrum, have out-dated statutory and regulatory advantages such as guaranteed carriage (must-carry), guaranteed placement on a must-buy broadcast tier, and non-duplication rules?

Answer: Because these requirements are statutory, the Commission lacks the discretion to alter them; any such change must come from Congress. Certainly, to the extent that Congress revises these provisions, I will adhere to the will of Congress.

4. Do you believe that recent, unprecedented payments by cable operators to broadcasters for retransmission consent may result in higher bills for cable subscribers? When Congress passed the Cable Consumer Protection and Competition Act of 1992 giving commercial broadcasters retransmission consent rights, it was mindful of the effect these rights could have on the prices paid by cable and other MVPD subscribers. A provision was added that required the FCC, in implementing retransmission consent, to consider "the impact that the grant of retransmission consent…may have on the rates for the basic tier" and to ensure that retransmission consent does not "conflict with the Commission's obligation…to ensure that the rates for basic service are reasonable" (47 U.S.C. § 325(b)(3)(A)). Given the recent trend of cable operators being forced to pay for retransmission consent rights, what specific actions does the Commission intend to take to comply with its statutory requirement to ensure that retransmission consent does not conflict with your obligation to ensure that rates for basic service are reasonable?

Answer: I share your concern about increasing cable rates. Should a party file a complaint alleging that the process is not working, the Media Bureau will review the matter and decide whether any action within the Commission's authority is warranted.

5. Will you please recommend any legislative changes which you believe would improve the current retransmission consent regime?

Answer: As I noted above, with few exceptions, retransmission consent negotiations result in agreements. Certainly, to the extent that Congress revises the Commission's authority in this area, I will adhere to the will of Congress.

6. What do you perceive would be the effect if Congress removed the requirement to include broadcast station in the basic cable tier or allowed consumers to bypass the purchase of local TV signals when subscribing to a MVPD service?

Answer: Such legislation could compromise the continued viability of local stations, with the possible loss of their more locally-oriented over-the-air service by those residents in their service area that choose to not (or economically cannot) subscribe to the higher tier of a pay service.

7. Would granting MVPDs the right to negotiate with broadcast stations from neighboring designated market areas (DMAs) create a more free-market condition for negotiating retransmission consent as the local broadcast station would no long have monopolistic powers?

Answer: Cable carriage of neighboring DMA stations could deprive subscribers of the more locally-oriented service provided by local stations. Moreover, negotiations with non-DMA stations could undermine the negotiating position of local stations, possibly compromising their continued viability, with the possible loss of their more locally-oriented over-the-air service by residents of their service area.

8. I understand that some would like to see the "white space" spectrum licensed and auctioned. Before the Senate Commerce, Science and Transportation Committee Chairman Martin outlined some concerns with that approach. I'd appreciate your thoughts on whether the spectrum should be licensed or unlicensed.

Answer: This proceeding presents the Commission with a number of complex and often conflicting policy issues. On the one hand, I believe that we should encourage the development and provision of new and innovative services to the extent that the technology allows. Nevertheless, we also have an obligation to protect the considerable number of existing licensees operating on the potentially affected channels from harmful interference that would restrict their ability to continue to provide their authorized service to the public. The parties to the white space proceeding have provided the Commission with a substantial record with regard to these matters, and we are in the process of evaluating their submissions, including the testing by our Office of Engineering & Technology ("OET") of the sample devices that they have submitted, with the objective of arriving at the correct resolution of these important issues.

9. Is it not true that an unlicensed approach will result in the efficient and timely use of the spectrum?

Answer: As I noted in response to the previous Question, this ongoing proceeding presents the Commission with a number of complex and often conflicting policy issues. The commenters are divided as to whether a licensed or unlicensed approach would be preferable. For example, some argue that the potential interference from unlicensed operation will be particularly disruptive to existing services, while others maintain that such concerns are without basis. The parties to the white space proceeding have also provided the Commission with a substantial record with regard to this matter, and we are in the process of evaluating their submissions and our OET is testing their sample devices.

10. Do the economic advantages and technical advances outweigh an inefficient and problematic auction of this spectrum?

Answer: We will weigh the economic and technical advantages and disadvantages of all possible approaches in our analysis of the record in the ongoing proceeding that we have developed.

11. Mr. Chairman, both small cable operators and rural telephone companies have expressed concern with the so-called "integration ban." As I understand the rule, cable operators are prohibited from offering set top boxes to their customers that include an integrated security function. These operators believe that rural customers may be forced to pay $2-$3 more to lease a cable box, and rural telephone companies have stated that implementation of the ban "would serve as an additional barrier to the delivery of video services, and the extension of broadband services, to rural customers." Why is the integration ban necessary and how is it consistent with the Cable Consumer Protection and Competition Act of 1992? Would consumers save more money if the ban was waived for rural and non-rural service providers?

Answer: In enacting Section 629 of the Act, Congress sought to ensure that consumers will have the opportunity to purchase set-top boxes from sources other than their cable and other MVPD service providers, with the expectation that competition in the manufacturing and distribution of such devices will result in lower prices and greater innovation and quality.
To date, the Media Bureau has acted on requests for waiver of the July 1, 2007, integration ban deadline filed by 149 parties, granting 136 requests and denying 13. I recognize the need of the industry to obtain further guidance in this area, and will endeavor to encourage action on any other waiver requests before us as expeditiously as possible.

12. It is my understanding that the Commission has several petitions before it regarding pole attachment matters. Do you believe the Commission should act on these petitions, or do you believe the Commission should refrain from acting until Congress enacts appropriate Pole Attachment Act reforms?

Answer: Pursuant to Section 224 of the Communications Act, the Commission is authorized to regulate the rates, terms and conditions imposed by utilities on cable television systems or providers of telecommunications service that have attachments to the utilities' poles, ducts,

conduits and rights-of-way, to assure that such rates, terms and conditions are just and reasonable, and to make certain that access to the utilities' poles, ducts, conduits and rights-of-way is provided in a nondiscriminatory manner.

The Commission has before it petitions for rulemaking asking the Commission to adopt, among other things, standard practices for pole and conduit access. As I evaluate those petitions, I plan to review the relationship between pole attachment access and broadband deployment. Certainly, to the extent that Congress enacts pole attachment reforms, I will adhere to the will of Congress.

The Honorable Mary Bono

1. Recently, Congressman Radanovich and I introduced H.R. 436, which restricts any state or political subdivision from imposing any new discriminatory taxes on cell phone services, mobile service providers, and mobile service property during a three year period. Could you please share with the committee your thoughts on the impact discriminatory telecommunications taxes have on the marketplace?

Answer: First, I note that the Commission as a regulatory agency does not implement taxes on telecommunications services. That being said, in light of the fact that providers of voice, broadband, and video services increasingly compete in one another's markets, as a Commissioner, I have sought to limit regulatory hindrances of such competition, in part by seeking to ensure a level regulatory playing field for competing platforms.

The Honorable George Radanovich

1. The Media Bureau has taken well beyond the 90 days allotted by Congress to make a decision on waiver requests from the integrated box ban. The Comcast denial took 266 days. As of March 14, 2007, the same day all of the Commissioners testified before our Subcommittee, the Charter request had been pending for 243 days, the Verizon request for 128 days, the NCTA request for 210 days, the Armstrong Utilities request for 128 days, the Sunflower request for 114 days, the RCN request for 99 days, the Suddenlink request for 99 days, the San Bruno request for 90 days, the Liberty Cablevision request for 90 days, the NPG Cable request for 90 days, and finally the Bresnan request for 85 days. All of these pending requests are currently over the time limit given to the Commission by Congress. Don't all of you believe it is time for the full Commission to step in and take a vote on these requests, which are critical to consumers?

Answer: To date, we have acted on requests for waiver of the integration ban deadline filed by 149 parties, granting 136 requests and denying 13. Of the waiver requests that you cite in your inquiry, the Media Bureau has acted on all but one, that of RCN, which is currently under review. I recognize the need of the industry to obtain further guidance in this area, and will endeavor to encourage action on any other waiver requests before us as expeditiously as possible.

June 5, 2007

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Mr. Chairman:

Thank you for appearing before the Subcommittee on Telecommunications and the Internet on Wednesday, March 14, 2007, at the hearing entitled "Oversight of the Federal Communications Commission." We appreciate the time and effort you gave as a witness before the Subcommittee on Telecommunications and the Internet.

Under the Rules of the Committee on Energy and Commerce, the hearing record remains open to permit Members to submit additional questions to the witnesses. Attached are questions directed to you from certain Members of the Committee. In preparing your answers to these questions, please address your response to the Members who have submitted the questions and include the text of the Member's question along with your response. In the event you have been asked questions from more than one Member of the Committee, please begin the responses to each Member on a new page.

To facilitate the printing of the hearing record, your responses to these questions should be received no later than the close of business **Friday, June 15, 2007**. Your written responses should be delivered to **316 Ford House Office Building** and faxed to **202-225-5288** to the attention of David Vogel, Legislative Analyst/Clerk TI. An electronic version of your response should also be sent by e-mail to Mr. David Vogel at **david.vogel@mail.house.gov** in a single Word formatted document.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact David Vogel at (202) 226-2424.

Sincerely,

JOHN D. DINGELL
CHAIRMAN

Attachment

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Edward J. Markey, Chairman
Subcommittee on Telecommunications and the Internet

The Honorable Fred Upton, Ranking Member
Subcommittee on Telecommunications and the Internet

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Chairman John D. Dingell

1. ***Backlog***

A. Please submit a list of all items (e.g., rulemakings, adjudications, complaints) that have been pending at the Commission for longer than 18 months. Please include the item title and a brief description of the issue, the responsible Bureau or Office, the origination date of the item, the docket number if applicable, and the current status of the item (*e.g.*, whether the record is closed and when; whether the item is pending at the Division, Bureau or full Commission; any statutory or Commission deadlines associated with the item).

Answer:

See attached chart for a list of all items as of July 5, 2007.

Although the chart does not depict indecency complaints, I note since 2002, the Commission has received more than 2.3 million complaints and resolved approximately 1.7 million. Since I became Chairman, the Commission has taken actions that addressed nearly 50 programs and nearly 1 million complaints. These actions are the subject of pending litigation in federal court. There remain approximately 584,000 complaints pending before the Commission. *See* Tab 1.

B. Please list all pending proceedings in which a court has remanded a matter to the Commission, but the Commission has not yet issued an order in response to the remand. Please include the date on which the court remanded the matter to the Commission.

Answer:

See Tab 2.

2. ***Personnel Issues***

A. Please confirm that all employees are being compensated in accordance with government regulations and all appropriate negotiated agreements between the union and the Commission for overtime work.

Answer:

All employees are being compensated in accordance with government regulations and all appropriate negotiated agreements between the union and Commission for overtime work. Compensation for overtime work is provided up to the salary limitations permitted by law (5 CFR 550.105). We have no official employee complaints regarding overtime at the Commission.

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B. Please explain why the Commission chose not to participate in the Office of Personnel Management Federal Human Capital Survey in 2006.

Answer:

Because it is optional, the FCC did not participate in the Federal Human Capital Survey (FHCS) conducted by the Office of Personnel Management (OPM) in 2006. As permitted by OPM, the FCC chose instead to conduct our own survey rather than participate in the larger Government-wide survey. The FCC's internal employee survey was conducted in 2006 pursuant to the requirements of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136, 5 U.S.C. note) (the Act). Though not required, the FCC included all the questions and definitions prescribed by OPM regulations that became effective on January 1, 2007, in our 2006 survey. In addition, we asked agency unique questions as required by the Act. We note also that the results of the FHCS are reported by OPM at the agency level only. By conducting our own survey, based on employee self-identification of their Bureau/Office, we can gauge employee satisfaction at the Bureau/Office level rather than just the agency level. We think the Bureau/Office specific data are more useful in understanding employee concerns. Our survey also included the questions used by OPM to rank agencies in the areas of (1) Leadership and Knowledge of Management; (2) Results Oriented Performance Culture; (3) Talent Management and (4) Job Satisfaction. Attached is a comparison between our survey and the OPM survey and a copy of the responses to each of our survey questions. These results from our survey are also available on the FCC's public website under About the FCC - Employee Survey Results. *See* Tab 3.

3. *Video Franchising/Section 621 Proceeding*

A. Please submit a copy of the transcript of the open meeting at which the Commission adopted the *Section 621 Order.*

Answer:

The Commission does not transcribe its meeting proceedings, but does retain audio-visual recordings of the proceedings. Attached please find a DVD of the December Open Meeting, where the Section 621 Report and Order was

adopted. If you would also like a written transcript of the December Open Meeting, please let us know and we will create one. *See* Tab 4.

B. Please submit a copy of the letter that the Commission sent to Verizon seeking "clarification" of issues raised by the City of Tampa in a filing made by the City. As we also discussed in the oversight hearing, please explain why the letter submitted by Verizon after the record closed and after the vote occurred was placed in the public record of the proceeding, while the letter sent by the City of Tampa after the record closed and after the vote occurred was not.

Answer:

Attached please find the January 5, 2007 letter from the City of Tampa, the January 26, 2007 *ex parte* letter from Verizon and the March 13, 2007 letter response to the City of Tampa as well as the referenced Associated Press story. *See* Tab 5. These letters are available electronically on the Commission's Electronic Comment Filing System. The letter sent by the City of Tampa was received during the "sunshine period" and was not prepared at the request of or in response to any Commission question. As such it technically violated our ex parte rules and therefore was not automatically part of the record of this proceeding. As further described below, the Verizon letter was submitted under an exemption to the "sunshine period" and was therefore in compliance with our rules and automatically made a part of the record in this proceeding. The Commission did not send Verizon a letter seeking clarification of the issues raised by the City of Tampa.

To address the issue that the City of Tampa's filing was not automatically part of the record, the Commission released a Public Notice waiving this procedural violation and placed the City of Tampa's letter officially in the record. In addition, I personally wrote to the City of Tampa responding to their concerns and referencing an article quoting City of Tampa officials. We have also placed my response and the story referenced in the record as well.

C. As requested at the hearing, please submit copies of materials submitted by the City of Tampa in the proceeding with an indication of whether or not such materials were made part of the record: all actions the Commission took in response to materials submitted by Tampa (including oral or written requests for clarification concerning this matter and to whom); and confirmation that all other parties involved in the City of Tampa allegations were afforded the same right to make additional submissions into the record following the Commission's vote and how they were so notified.

Answer:

Attached please find copies of the materials submitted by the City of Tampa in the proceeding. *See* Tab 6. All materials were automatically part of the record, except for the January 5, 2007 *ex parte* letter which was submitted during the "sunshine period" without any Commission request and thus violated our ex-parte rules. Despite the fact that the submission violated our procedures the Commission took the issues raised by the City of Tampa following the Commission's open meeting on December 20, 2006 seriously and took steps to ensure that the record regarding events in Tampa was accurate. Specifically, the Commission contacted Verizon by telephone to request that the company submit information to clarify the record, as permitted under Sections 1.1203 and 1.1204(a)(10) of the Commission's rules. Section 1.1203 generally prohibits *ex parte* presentations during the "sunshine period" between the release of a Commission meeting agenda and the release of an order adopted during that meeting but the rule contains several exemptions. For example, there is a standard exemption when the "presentation is requested by the Commission or staff for the clarification or adduction of evidence, or for resolution of issues. . . ." 47 C.F.R. § 1.1204(a)(10). To address the issue that the City of Tampa's filing was not automatically part of the record, the Commission released a Public Notice waiving this procedural violation and placed the City of Tampa's letter officially in the record. In addition, I personally wrote to the City of Tampa responding to their concerns and referencing an article quoting City of Tampa officials. We have also placed my response, and the story referenced, in the record as well. No other parties were involved in the City of Tampa allegations.

D. To revisit an issue that you and I discussed in the oversight hearing, I remain puzzled by the extent and nature of the *Section 621 Order's* preemption of local governments. The Commission preempts local laws unless they are "specifically" authorized by state law, while franchising decisions "where a state is involved, either by issuing franchises at the state level or enacting laws governing specific aspects of the franchising process" are not preempted.

i. Under this approach, state laws that are substantively identical to preempted local laws would appear to remain in effect. For instance, "local" level playing field requirements are preempted, but presumably not state laws addressing the very same issue. Can you please provide the Committee with examples of state level playing field requirements that will not be preempted by the Order, and local level playing field requirements that will be preempted?

Answer:

The record in the proceeding contained many examples of local level playing field requirements that unreasonably delayed or stymied the issuance of cable franchises to new competitors, thereby justifying the Commission's preemption action under Section 621(a)(1). Examples include mandates imposed through provisions inserted in incumbent franchise agreements as granted by the cities of Longmont, Colorado ("the material provisions of the other agreement must be reasonably comparable to the material provisions of the current franchise"); Leavenworth, Kansas ("[i]f the city permits such similar use of its streets ... upon terms and conditions which are less burdensome or more favorable to another operator of a cable communications system than the terms and conditions of this franchise, then the cable provider may elect to modify this franchise"); Billerica, Massachusetts ("grant of any additional cable television license(s) shall not be on terms more favorable or less burdensome than those contained in this renewal license"); and South Portland, Maine ("If the City grants a cable franchise to anyone other than the Company..., then, at the Company's option, the Company's franchise shall be automatically amended or conformed in whole or in part at the Company's sole discretion, as the case may be so that it is no less favorable than the most favorable franchise granted to any other entity.").

The Commission, however, did not preempt state level playing field requirements. Specifically, as discussed in the 621 Order at footnote 2, the Commission found that, "[W]hile there is a sufficient record before us to generally determine what constitutes an 'unreasonable refusal to award an additional competitive franchise' at the local level under Section 621(a)(1), we do not have sufficient information to make such determinations with respect to franchising decisions where a state is involved, either by issuing franchises at the state level or enacting laws governing specific aspects of the franchising process. We therefore expressly limit our findings and regulations in this *Order* to actions or inactions at the local level where a state has not specifically circumscribed the LFA's authority."

The Commission noted that "at least 10 states impose level-playing-field requirements upon LFAs, and those laws vary significantly in the subject matters they encompass." Examples include: MINN. STAT. ANN. § 238.08 (West 2006), 55 ILL. COMP. STAT. ANN. 5/5-1095(e)(4) (West 2006), ALA. CODE § 11-27-2 (2005), CONN. GEN. STAT. § 16-331(g) (2006), FLA. STAT. § 166.046(3) (2006), N.H. REV. STAT. ANN. § 53-C:3-b (2005), OKLA. STAT. ANN. tit. 11, § 22-107.1(B) (West 2006). S.D. CODIFIED LAWS § 9-35-27 (2005), TENN. CODE. ANN. § 7-59-203 (2005).

ii. The distinction in the *Section 621 Order* between permissible state laws and impermissible local laws appears to run afoul of the fact that local governments are creatures of the State and presumably act only

pursuant to state law. This Committee recognized this relationship in 1984, when we passed the Cable Act, and expressly determined not to disturb "the traditional relationship between state and local governments, under which a local government is a political subdivision of the State and derives its authority from the State." In other words, it appears that the Commission's *Order* creates a distinction between valid state-level regulation and invalid local regulation, and that this distinction cannot be traced to the statute. Can you please explain the Commission's rationale for this inconsistency?

Answer:

Based on the record, the Commission limited the findings and regulations in the 621 Report and Order to actions or inactions at the local level where a State has not specifically circumscribed the LFA's authority. While there was a sufficient record to determine generally what constitutes an "unreasonable refusal to award an additional competitive franchise" at the county or municipal level under section 621(a)(1), the Commission lacked a sufficient record to make such determinations with respect to franchising decisions and/or laws enacted at the State level. Many of the statewide franchising laws have only been in effect for a short period of time and, indeed, several States have enacted such laws since release of the 621 Report and Order. The Commission found that State level reforms appeared to offer promise in assisting new entrants to more quickly begin offering consumers a competitive choice among cable providers. Moreover, the Commission recognized that in light of differences between the scope of franchises issued at the State level and those issued at the local level, it may be necessary to use different criteria for determining what may be unreasonable with respect to key franchising issues. Because of the lack of record evidence concerning franchising at the State level, the Commission chose, consistent with legal precedent, to proceed incrementally by addressing the area which most evidenced the need for reform, *i.e.,* the franchising process at the local level.

iii. With respect to each specific allegation cited in the *Section 621 Order* of a locality's actions that imposed "unreasonable barriers to entry into the cable market," please provide a brief summary of any rebuttal submitted into the record of the proceeding, with citations. If the rebuttal is cited in the *Section 621 Order*, please refer to the paragraph or footnote in which that citation can be found.

Answer:

With the exception of the Tampa, Florida allegations and rebuttal as discussed above, no other community rebutted the specific allegations discussed in the 621 Report and Order.

As noted in footnote 351 of the 621 Report and Order, some communities did argue that commenters' allegations failed to identify the local franchising authorities in question. The Commission noted that it need not resolve particular disputes between parties, however, in order to address the general issue of whether particular types of mandates or demands constitute unreasonable refusals to award competitive franchises. The analysis is a matter of statutory construction and all commenters had opportunity to address this issue. One community responded to allegations of unreasonable barriers, but did not rebut the allegations. (Footnote 77 of the Section 621 Report and Order, cites allegations by Qwest that the City of Colorado Springs, Colorado asked Qwest to file a "friendly lawsuit" to invalidate a provision in the City Charter requiring a franchise agreement be approved by voters rather than a franchising authority; and also cites the City of Colorado Spring's response that did not refute that the City asked Qwest to sue it). Another locality questioned a specific allegation, but stated that it was unable to refute the allegations since there was no specific community identified. (Paragraph 43 of the Report and Order, discusses Verizon's allegation that a community requested the purchase of street lights. *See also* Reply Comments of Anne Arundel, Maryland, *et al.* at 5-6, questioning whether any community required Verizon to purchase street lights as part of its franchise negotiations, since Verizon did not provide the name of the community that made this request).

E. Has the Commission made any effort to gather information about the financial and other effects of its *FNPRM* proposal and the *Section 621 Order* on local governments and PEG centers across the nation? If so, please provide copies of all such analysis. Please indicate whether the financial effect information was discussed in the *Section 621 Order* or the *FNPRM*. If such information was not discussed, will the Commission consider such information in the *FNPRM*?

Answer:

The Commission considered all comments filed in the record about the statutory interpretation and financial effect of that interpretation in the Section 621 Order. In the Section 621 Report and Order, the Commission ultimately determined it was simply interpreting statutory language. *See e.g.*, 47 U.S.C. 542(g). Aside from comments received in the record of the proceeding, the Commission has no other analyses on the financial and other effects of its FNPRM proposal or the Section 621 Report and Order on local government

and PEG Centers. We have recently reviewed all information and data that was submitted in response to the Further Notice of Proposed Rulemaking, and I have circulated a Second Report and Order to my fellow Commissioners.

F. ***Referral of City of Richmond v. Cavalier Telephone***

A pending lawsuit between Cavalier Telephone and the City of Richmond regarding the regulatory classification of Cavalier's Internet Protocal Television service (IPTV) was recently referred to by the Commission. As you know, the Committee took a close look at this issue last year. Am I correct in assuming that the Commission will handle this referral through normal procedures, i.e., through a declaratory ruling issued by the full Commission, after providing notice and opportunity for public comment, after a petition for such a ruling is filed by Cavalier?

Answer:

In 2004, SBC (now AT&T) filed a petition seeking a declaratory ruling that, among other things, Internet Protocol (IP) platform services, including video services, do not fit any of the service-specific legacy regulatory regimes in the Communications Act, including the cable franchising regime of Title VI. The Commission is currently considering the regulatory classification of IP-enabled services, including SBC's IPTV services, in its *IP-Enabled Services* rulemaking. The Commission expressly incorporated SBC's petition and the associated record into the *IP-Enabled Services* proceeding. The *IP-Enabled Services* rulemaking has been put out for notice and comment and the opportunity for public comment was provided. SBC's petition and the *IP-Enabled Services* rulemaking remain pending.

To my knowledge, the Commission has not yet received a petition from Cavalier regarding the regulatory classification of its IPTV service.

4. ***Regulatory Fees***

On April 30, 2004, the Commission issued a Public Notice regarding a request by local governments for a declaratory ruling from the Commission to clarify that the regulatory fee paid by a cable operator to the Federal government pursuant to 47 USC Section 159 is not a franchise fee within the meaning of Section 622(g) of the Act. Please provide the status of that proceeding.

Answer:

The record in this proceeding has closed and staff in the Commission's Media Bureau currently are reviewing the comments filed in the proceeding. I have circulated a decision in this matter to my fellow Commissioners.

5. *Minority Ownership*

As a follow up to your recent meeting with Congressman Charlie Rangel, I share his interest in supporting telecommunications ownership opportunities for small businesses, new entrants, and disadvantaged groups. Please provide an update on Commission efforts to encourage companies that engage in transactions and license transfers to include small businesses, new entrants, and disadvantaged groups during negotiations on properties identified for divestiture.

Answer:

The Commission is committed to expanding opportunities for entry into media ownership and programming, as well as other communications services. In March, I presented my fellow Commissioners with a draft Notice of Proposed Rulemaking concerning several initiatives to increase participation in the broadcasting industry by new entrants and small businesses, including minority- and women-owned businesses. The Commission's proposal would allow licensees of digital television stations to enter into agreements by which the stations share some of their digital capacity with "qualified entities." The entities would be treated the same as operators of other television broadcast stations and would provide their own over-the-air programming to viewers as a new television station in the market. The Notice also invites comment on a proposal to allow "qualified entities" to purchase expiring construction permits and be allotted additional time to construct the broadcast facilities. In addition, the Notice seeks input on whether the Commission's "equity/debt plus" attribution rule should be waived or modified where doing so would assist qualified entities in acquiring or retaining an existing broadcast station, or building broadcast facilities authorized by a construction permit. Finally, the *Notice* seeks comment on the constitutionality of defining qualified entities in a manner that includes racial classifications, given that any race conscious measure the Commission may adopt will trigger strict scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment.

Through its Office of Communications Business Opportunities, the Commission also provides a range of outreach services to assist small businesses and new entrants, including those owned by women and minorities, to acquire radio and television broadcast stations. The Commission also has established an "Indian Telecommunications Initiative" (ITI) which focuses on increasing telecommunications access in Indian Country through Universal Service support programs, spectrum auctions, and guidance on participating in the FCC's

regulatory process. The ITI includes rulemakings and special projects, interactive regional workshops, staff participation at conferences sponsored by Tribal organizations, and meetings with representatives of individual Tribal Nations regarding their unique telecommunications issues. Most recently, the ITI held a workshop in Albuquerque, New Mexico on July 10-11, 2007, which focused on radio and broadcast ownership that should help tribes to identify strategies and resources necessary to enter the media market and help tribes become acquainted with FCC rules and regulations that potentially impact them.

The Commission also makes available senior staff to attend various seminars and conferences to address the needs of small businesses and new entrants. For example, Commission staff has participated for several years in annual training sessions conducted by the National Association of Broadcasters Education Foundation (NABEF). Commission staff also conducts auction seminars prior to each broadcast auction. Members of the public are invited to attend the seminars in person at the Commission's Washington, D.C. headquarters or to view the streamed presentation on the Commission's website. The broadcast industry also has engaged in outreach efforts. For example, in connection with the sale of certain Clear Channel stations, Minority Media & Telecommunications Council (MMTC), recently conducted a conference, sponsored by Clear Channel and hosted by the National Association of Broadcasters, and Education Foundation to help ensure that minority and women entrepreneurs have access to the information necessary to enable them to participate in the acquisition of Clear Channel radio and television assets.

The Commission looks forward to receiving recommendations from the re-chartered Federal Advisory Committee on Diversity in the Digital Age to promote the ability of all Americans, including minorities and women, to participate in the communications industry. The Advisory Committee has begun to develop "best practices" to address obstacles faced by minorities in obtaining access to capital and to identify opportunities for minorities resulting from new technologies. Most recently, a full council meeting was held on May 29, 2007 and one is scheduled for Thursday, September 27th at 10:00 a.m. Further, all three subcommittees, Outreach, Access to Capital and New Technologies have scheduled subcommittee meetings. The May 29, 2007 meeting included a discussion as to how the digital transition creates new opportunities for diverse spectrum use that results in new opportunities for minority applicants. In addition, a public interest group forum at the meeting precipitated discussion. Participants included representatives from American Women in Radio & Television, Independent Spanish Broadcasters Association, and Media Access Project.

In addition, recently the Media Bureau granted applications to assign 5 FM stations and 1 AM station from Clear Channel to Great Eastern Radio, LLC. The stations are in the Lebanon-Rutland-White River Junction market. This is the first station sale of a grandfathered radio combination (involving one station over the

FM subcap) under the small business "eligible entity" exception adopted as part of the 2003 ownership rules revisions. Under that provision a qualifying small business may acquire a seller's entire grandfathered cluster. This acquisition by Great Eastern, a locally-based small business, will promote ownership diversity in the market. And because two other Clear Channel same market stations are being sold to a different buyer, the transaction also will result in increased local competition.

The Commission has approved divestitures to small businesses and other entities in the past, and encourages divesting parties to consider such entities when negotiating divestitures.

6. ***Telecommunications Development Fund***

Given your role with the Telecommunications Development Fund, how is that fund being used to further its mission, and what future use do you see being made of the fund to assist in stimulating new technologies in support of the country's long-term broadband needs and goals? Please identify whether there are any unfilled seats on the board and when those seats will be filled?

Answer:

TDF has a strategy of targeting entrepreneurs starting small companies that solve problems in the Communications industry. TDF has invested in eight companies that address needs in broadband access, the DTV transition, homeland security, public safety/disaster recovery, and the protection of intellectual property.

TDF also has a separate not-for profit entity dedicated to entrepreneur education and promoting small business development in underserved rural and urban areas. TDF partners with established organizations to identify the needs of entrepreneurs, develop innovative programs and training to address these areas, and promote program sustainability by providing support to the entrepreneur as their business grows. TDF has partnered with the following organizations:

- Alaska Federation of Natives – creating the Alaska Marketplace, which works with local entrepreneurs to solve local economic problems
- National Association of Broadcasters Education Foundation Broadcast Leadership Training Program – agreeing to sponsor one BLT fellowship a year for the next three years
- National Foundation for Teaching Entrepreneurship – promoting entrepreneurship through education and business plan competitions, which make it possible for high school students from low-income communities to create original business plans and to compete for seed funding for their businesses

- The University of Virginia Engineering School faculty – sponsoring a team to participate in the DARPA Challenge, which mobilizes the technical community to accelerate research and development in critical national security technology areas
- A variety of forums, which promote access to capital for entrepreneurs and small businesses both inside and outside the communications industry and in urban and rural communities

TDF has three public sector and four private sector board seats. The FCC is responsible for filling the four private sector seats, all of which are currently filled. The public sector seats, by statute, consist of one representative of the Small Business Administration, one of representative of the Department of Treasury, and one representative of the Federal Communications Commission. Of these three, the seat of the Department of Treasury is currently vacant.

7. *Armstrong Williams Investigation*

Please provide the status of the Commission's investigation into potential sponsorship identification rule violations involving commentator Armstrong Williams, begun in January 2005. Please detail the 12 broadcasters that you identified as airing the shows in question. Please provide copies of all inquiries and other communications sent by the Commission to the three broadcasters for whom the investigation is continuing. To the extent there are any factors or circumstances preventing completion of the investigation, please detail what those factors are and what steps the Commission has taken to address them.

Answer:

Based on information uncovered in the course of its investigation, the Commission's Enforcement Bureau (EB) issued Letters of Inquiry (LOIs) on November 7, 2006, to 12 licensees (55 stations) concerning programming provided by Armstrong Williams, and directed them to respond within 45 days. The LOIs identified eight specific episodes of "The Right Side [with Armstrong Williams]"(RSAW) and one specific episode of "America's Black Forum" (ABF) in which Williams appeared as a guest and asked whether the licensees aired the programs. Those licensees were:

Emmis Radio License Corporation of New York

Access 1 New York License Co.

Summit City License Sub, LLC

WJZD, Inc.

Dublin Radio

Decatur Communications Properties, LLC

Base Communications, Inc.

WLTH Radio, Inc.

Glory Communications, Inc.

SRQ Radio, LLC

Sinclair Broadcasting Group, Inc.

Sonshine Family Television, Inc.

In response to EB's LOIs, seven licensees state that they did not carry any of the subject Williams programming. On January 31, 2007, EB issued dismissal letters closing these investigations on this basis.

Two licensees can neither affirm nor deny whether they broadcast RSAW (one denies airing ABF while the other cannot determine whether it aired ABF). One of the licensees did not own the station at time of the relevant broadcasts and the former owner is no longer a licensee. The other licensee simply cannot ascertain from available records whether the programs were aired. Because neither of these stations was the subject of complaints and given the absence of reliable corroborating evidence that the programs were aired, EB issued dismissal letters closing these investigations on January 31, 2007.

One licensee responded that it had aired the Williams programming but had included a sponsorship identification. Given this, EB concluded that no violation of the sponsorship rules had occurred and issued a dismissal letter closing the investigation on January 31, 2007.

On May 16, 2007, EB issued LOIs to three additional licensees and a further LOI to Sinclair concerning two additional stations identified by the complainants. All three licensees and the two Sinclair stations have denied that they aired any of the program material identified in the LOIs. Based on that record, on June 29, 2007, EB dismissed the complaints against these three additional licensees and the two additional Sinclair stations.

Copies of all inquiries and other communications sent by the Commission to the two remaining broadcasters for whom the investigation is continuing, Sinclair and Sonshine, are attached. *See* Tab 7.

With respect to Sinclair and Sonshine, the Commission recently adopted NALs against these companies for apparent violations of the sponsorship identification requirements in section 317(a)(1) of the Communications Act and the Commission's rules.

In addition, EB recently issued a citation to Armstrong Williams and the Graham Williams Group, Mr. Williams's production company, for violating the disclosure obligations of section 507 of the Communications Act. EB has also closed the investigation against Ketchum, Inc., Mr. Williams's prime contractor, finding no evidence of any violation of the Communications Act or our rules.

8. *Pre-recorded Messages*

Please provide the status and a copy of all informal or formal complaints received by the Commission since May 2006 regarding use of pre-recorded messages.

Violations of the Commission's Telephone Consumer Protection Act rules, including those restricting the use of pre-recorded messages, continue to be of significant concern to American consumers.

The Commission's goal is to complete its review of these complaints within 120 days of receipt, and we appear to be on target for this review.

As of July 9, 2007, the Commission had received more than 4000 (4271) complaints regarding pre-recorded messages since May of 2006. As of July, the Commission had completed its review and investigation of all complaints filed before April 2007.

From May 2006 through July 2007, the Commission issued 316 citations covering 370 consumer complaints. These citations address all actionable complaints received from May 2006 through March 2007, as well as some complaints received before that time period.

Approximately 60% (approximately 2525) of all of the complaints were not actionable because either they fell within an exception to our rules or did not contain enough information for the Commission to respond. Where consumers did not provide enough information, we sent them a letter outlining how they could re-submit their complaint with the necessary information.

In response to our concern that the Commission was unable to investigate a large percentage of consumer complaints submitted because they did not contain enough information, the Commission implemented a new electronic form on May 1, 2007 for telemarketing complaints, including those involving prerecorded messages. This new form makes it easier for consumers to file complaints with the Commission and also clarifies what information is needed to take enforcement action. *See* Boxes A-D.

9. *E-Rate*

I understand that on June 7, 2007, the Commission directed the Universal Service Administrative Company (USAC) to roll over $650 million in unused funds from Funding Years 2001-2004 in keeping with Commission rules. I commend you on taking this action. I am curious about the Commission's intentions for future years. Can you confirm

that the Commission intends to direct that the rollover occur on a regular or annual basis?

Answer:

The Commission regularly reviews USAC's unused funds and periodically authorizes the use of these funds. For example, on June 28, 2004, the Commission directed USAC to roll over $150 million in unused funds from Funding Year 2001 for use in Funding Year 2004. As you noted, on June 7, 2007, the Commission directed the Universal Service Administrative Company (USAC) to roll over $650 million in unused funds from Funding Years 2001-2004 for use in Funding Year 2007. We will continue to regularly evaluate the roll over of unused funds pursuant to section 54.507 of the Commission's rules.

10. ***ETC Designation Process***

Please list each application for designation as an Eligible Telecommunications Carrier that is currently pending at the Commission and the date that the application was filed. Please list all applications that have been granted in the past three years, the date each application was filed, and the date the Commission acted on such application, if applicable.

Answer:

See Tab 8.

11. ***Wireless Roaming***

I understand that the Commission opened a docket to consider roaming agreements in November 2000. The Commission terminated that proceeding and initiated another proceeding entitled "Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers" in August 2005. Please report on the status of the proceeding. When does the Commission intend to address the issues raised in the 2005 Notice of Proposed Rulemaking?

Answer:

The Commission recently clarified that automatic roaming is a common carrier obligation for commercial mobile radio service carriers, requiring them to provide roaming services to other carriers upon reasonable request and on a

just, reasonable, and non-discriminatory basis pursuant to Sections 201 and 202 of the Communications Act.

12. *Telephone Record Privacy*

A pair of recent government audits discussed the Federal Bureau of Investigation's use of National Security Letters and/or exigent letters to secure telephone records. One of these reports found that the FBI contracted with three telephone companies to potentially circumvent statutory requirements by providing the FBI with access to "records held by these companies, including telephone records" without properly authorized Grand Jury subpoenas or National Security Letters (NSLs). Access was given with "exigent letters" that claimed there were "exigent circumstances," and claimed that requests for Grand Jury subpoenas had been submitted to the U.S. Attorney and would be forthcoming "as expeditiously as possible." There were 739 exigent letters requesting information on 3,000 different telephone numbers. One letter requested information on 171 different numbers. The FBI could not provide the Inspector General with reliable information demonstrating that an NSL or Grand Jury subpoena was issued following receipt of the information requested. Another report found over 700 instances where telecommunications companies provided more information to the government than was actually requested, and that the government could not confirm that the additional, unrequested information was destroyed or deleted.

A. Given this new information, does the Commission plan on investigating whether the actions by telephone companies violated the privacy requirements of the Communications Act?

Answer:

It is my understanding that the FBI and Department of Justice have undertaken a number of reforms and corrective actions in response to the Inspector General's report, including strengthening internal controls, improving oversight of the NSL approval process and barring the use of exigent letters. In addition, they have also ensured that any information to which the FBI is not legally entitled is sealed, sequestered, and, where appropriate, destroyed.

B. What type of records are telephone companies required to keep to ensure that information or documents they provide to the FBI under arrangements such as these are provided under proper legal process?

Answer:

The Commission does require carriers to maintain specified records when assisting law enforcement in the real-time interception of communications or provision of access to call-identifying information pursuant to the Communications Assistance for Law Enforcement Act. Specifically, a telecommunications carrier is required by section 1.20004 of the Commission's rules (47 C.F.R. § 1.20004) to maintain a "secure and accurate record of each interception of communication or access to call-identifying information, made with our without appropriate authorization, in the form of a single certification" that must include, among other things: the telephone number and/or circuit identification numbers involved; the start date and time of the surveillance; and the identity of the law enforcement officer presenting the authorization for the interception of communications or access to call-identifying information. Additionally, such certification must be signed by an appropriately designated official and must be maintained by the carrier for a reasonable period of time.

The Commission does not have regulations that specifically require telephone companies to obtain additional records when they produce information or documents in response to National Security Letters or grand jury subpoenas.

C. Did you or any Commission staff discuss this matter with representatives of the Executive Branch, the FBI, or representatives of any of the three telephone companies? If so, please summarize these discussions.

Answer:

We were informed of the release of the report.

D. Apart from whether the Commission has the authority to investigate whether carriers violated the Communications Act in connection with the National Security Agency wiretap program, did any telecommunications carrier contact you or Commission staff with respect to this program? Did you or other Commission staff contact any carrier, or otherwise have any discussions with any carrier regarding the program?

Answer:

Commission staff has had discussions with carriers regarding the Commission's legal authority to investigate the alleged surveillance program. Specifically, the Office of General Counsel has had discussions

with telecommunications lawyers about our legal authority to investigate whether carriers violated the Communications Act in connection with the alleged surveillance program. I am not aware of any discussions regarding the alleged program itself.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Bart Stupak

1. **FCC recently ruled that telecommunications carriers are entitled to interconnect and exchange traffic with incumbent local exchange carriers (ILEC) pursuant to sections 251(a) and (b) of the Communications Act for the purpose of providing wholesale telecommunications services, including the provision of those services to Voice-Over-Internet Protocol (VoIP) providers. I commend the Commission for issuing this ruling and removing any ambiguity over the duty of incumbent local exchange carriers to provide interconnection.**

2. **I am puzzled, however, why you limited your ruling to a wholesale carrier's rights under sections 251(a) and 251(b), and specifically chose not to affirm their rights under section 251(c), which includes the important ILEC duty under subsection (c)(2) to provide interconnection at any technically feasible point. The order explains this omission by stating that "neither of the primary state commission proceedings underlying the Petition relied on or even interpreted section 251(c) of the Act," but Time Warner's petition specifically mentions section 251(c)(2).**

   Answer:

   The Time Warner Cable (TWC) petition concerning wholesale interconnection primarily focused on sections 251(a) and (b) of the Act. Indeed, the analysis of the underlying state decisions, which TWC objected to, was limited to interpreting these sections of the Act. The Bureau's declaratory ruling thus focused on wholesale carriers' interconnection rights under section 251(a) and (b), which issues were thoroughly developed in the record. The section 251(c) issue was not similarly pleaded or as well developed in the record. In any event, the Wireline Competition Bureau granted TWC's petition, thus ensuring the rights of wholesale telecommunications carriers to interconnect with incumbents to the same extent as retail telecommunications carriers.

3. **Would not the rationale underlying your ruling that an ILEC's duties under section 251(a) and 251(b) extend to interconnection requests from wholesale carriers apply with equal force to ILEC's duties under Section 251(c), specifically section 251(c)(2). As an aside, I would note that last year's telecommunications rewrite bill, overwhelmingly approved by the House, included a provision that would have ensured that VoIP providers**

have the same interconnection rights under all of section 251, including section 251(c).

Answer:

The Wireline Competition Bureau's Order did not specifically address section 251(c)(2). The Bureau's recent declaratory ruling, however, grants Time Warner Cable (TWC) the interconnection rights it asked for in the petition. Moreover, section 251(c)(2) generally does not apply to "rural telephone companies," which the record indicated were of particular concern to TWC. The Bureau's holding under sections 251(a) and (b) clarified the interconnection responsibilities of *all* incumbent LECs, including "rural telephone companies," providing the relief that TWC sought.

4. **In addition, some ILECs have sought to evade their interconnection obligations by asserting that wholesale carriers serving VoIP providers operate as private carriers, rather than common carriers. The Commission has previously made clear that a service provider is a common carrier as long as it holds itself out as willing to serve a class of similarly situated customers, but the declaratory ruling did not address this. Will the Commission clarify that a wholesale provider's self-certification of its willingness to be treated as a common carrier is all that can be required to demonstrate its entitlement to interconnection?**

Answer:

Ultimately, it is the states that generally are responsible for certifying entities as common carriers with regard to local telecommunications services. Established judicial precedent sets forth a fact-specific analysis for purposes of determining whether a service is offered on a common carriage or private carriage basis. *See, e.g.*, *National Ass'n of Regulatory Utility Com'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976); *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999). As the Bureau's order made clear, the Commission has long utilized that applicable precedent, and "the definition of 'telecommunications services' long has been held to include both retail and wholesale services under Commission precedent." *Time Warner Cable Order*, para. 12. Thus, the Bureau order held that "[t]he South Carolina Commission's . . . interpretation – that services provided on a wholesale basis to carriers or other providers are not telecommunications services because they are not offered 'directly to the public' has been expressly rejected by the Commission in the past." *Time Warner Cable Order*, para. 11. I believe that the Bureau's declaratory ruling should remove any doubt that wholesale providers of telecommunications services, including those serving VoIP providers, are entitled to interconnection.

Further, pursuant to section 252 of the Act, the implementation of section 251 rights occur through interconnection agreements arbitrated and approved, as an initial matter, by the relevant state commission. To the extent that parties file Petitions for Declaratory Ruling with the Commission, similar to TWC's, identifying state commission decisions denying interconnection, the Commission stands ready to evaluate such Petitions.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Gene Green

1. **You completed a report in the fall 2005 concluding that the retransmission process was working as Congress intended. What led you to that conclusion and have developments since then caused you to reconsider that conclusion?**

Answer:

The Commission's 2005 report concluded that, "overall, the regulatory policies established by Congress when it enacted retransmission consent have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals." (Report at para. 44). This conclusion was based on our evaluation of comments from broadcasters and MVPDs submitted for the report and previous Commission review of retransmission consent. The Commission has observed that "both the broadcaster and MVPD benefit when carriage is arranged – the station benefits from carriage because its programming and advertising will be carried as part of the MVPD's service, and the MVPD benefits because the station's programming makes the MVPD's offerings more appealing to consumers. Most importantly, consumers benefit by having access to such programming via an MVPD. Thus, as a general rule, the local television broadcaster and the MVPD negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side." (Report at para. 44).

The Report also found that, "the retransmission consent rules are part of a carefully balanced combination of laws and regulations governing carriage of television broadcast signals, with the must-carry and retransmission consent regimes complementing one another." (Report at para. 45). Furthermore, "broadcast mandatory carry rights, which promote localism and ensure the viability of free, over-the-air television, complement the retransmission consent regime. Together, must-carry and retransmission consent provide that all local stations are assured of carriage even if their audience is small, while also allowing more popular stations to seek compensation (cash or in-kind) for the audience their programming will attract for the cable or satellite operator. Must-carry alone would fail to provide stations with the opportunity to be compensated for their popular programming. Retransmission consent alone would not preserve local stations that have a smaller audience yet still offer free over-the-air programming and serve the public in their local areas." (Report at para. 33).

As part of our annual Video Competition Report, the Commission monitors the current state of the retransmission consent market. In its most recent report to Congress, the Commission noted that distributors of video programming generally

assert that retransmission consent, regardless of the form of compensation (*e.g.*, cash, purchases of advertising, carriage of other affiliated programming, etc.) was too expensive and has caused rates to increase. The Commission noted that broadcasters, on the other hand, support the existing system as a process that fairly compensates them for carriage of their programming.

While I generally have concerns about intervening in private negotiations, I recognize that the failure of a broadcaster and an MVPD to reach a retransmission consent agreement harms not just the broadcaster and the MVPD, but all of the viewers affected by the removal of a station's signal from the MVPD system. If Congress determines the retransmission consent process needs reformation, it could give the Commission the authority to order arbitration of retransmission consent disputes by the Media Bureau, and require carriage during the arbitration process. To ensure that such arbitration process reaches a fair result in the context of the broader media industry, the Commission also would need to be sure that it had the tools necessary to obtain similar pricing information from other broadcasters, cable operators, and programmers. Without access to such information, it would be difficult for the Commission to determine whether offers from either party are appropriate.

Additional Questions from The Honorable Gene Green

1. **Many of the large Silicon Valley search engine and web portal content providers who lobby for non-discrimination network neutrality rules say that they want to prohibit network operators from offering faster service to certain content providers for a fee. However, it appears that many of these same content providers are already paying for faster service without any complaints. Instead of paying the network provider for faster service, they are paying the companies like Akamai to position numerous local servers located around the country near the network providers last-mile networks, to enable them to deliver their content faster than those who do not pay these server companies.**

    - **Is this kind of behavior legally distinguishable from network providers themselves offering faster service for a fee and acceptable to the individual Commissioners?**

Answer:

On August 5, 2005, the Commission adopted an Internet Policy Statement "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers." Specifically, the Commission adopted the four following principles:

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.

As I have said in the past, network providers should have the ability to offer consumers different speeds of service and plans with different quality of service guarantees. Some consumers are willing to pay more for a faster speed or higher quality of service. I should also note that traffic prioritization already occurs today. For example, voice is prioritized over data traffic, and video is prioritized over other data traffic. Likewise, content providers, for example, should be able to develop systems that speed information to consumers and improve competition.

The Commission recently initiated a Notice of Inquiry seeking comment on broadband industry practices generally, including the practices of content providers, network operators, and other market participants such as the practices that you mention. This inquiry will provide a convenient forum for such providers to tell us what is happening in the market and about their concerns, including the types of issues that you raise. Gathering this information will allow the Commission to better monitor the market and determine the extent to which providers are acting consistently with our Internet Policy Statement.

2. **Another important factor to consider in network neutrality is peer-to-peer technology. Some analysts claim that peer-to-peer traffic, much of it arguably illegal file-sharing of copyrighted material, may take up over 50 percent of our current last-mile network capacity. Does FCC have any information on this?**

Answer:

The FCC does not routinely collect this information. The Commission recently initiated a Notice of Inquiry seeking comment on broadband industry practices generally, including the practices of content providers, network operators, and

other market participants. In this inquiry, several parties provided estimates on the amount of capacity being used by peer-to-peer traffic. *See, e.g.*, NBC Comments, WC Docket No. 07-52, at 1-2 (citing studies indicating that "[a]s much as 60-70% of traffic on the Internet consists of P2P file transfers by a very small minority – fewer than 5% – of users."); NCTA Comments, WC Docket No. 02-52 at 28-29 (citing data indicating that "as much as 30 percent of downstream capacity," and "almost 70 percent of upstream traffic" can be consumed by peer-to-peer traffic). In addition, I would note that the Federal Trade Commission recently issued a staff report cited data suggesting that peer-to-peer traffic can consume significant network resources. *See* Federal Trade Commission, *Broadband Connectivity Competition Policy*, at 29 n.101.

3. **With the announcement and beta launch of a new service called "Joost" and their content deal with Viacom, we are close to a commercial launch of a peer-to-peer, full-screen, streaming TV quality video-over-the-Internet service. Recently, one Google executive remarked that the Internet may not be able to handle this type of technology and that the Internet was not sealable to mass-use of full screen, TV-quality video.**

4. **Is our economic and regulatory framework for last-mile networks sustainable if a company can just buy some servers, connect to the Internet backbone, and compete with cable television by only paying for content and not the cost of investing in residential networks? Has the Commission examined this new service and how does it and similar new video-over-the-Internet services such as movie downloads affect the network neutrality debate? Does the Commission think that the Internet is sealable for mass use of full-screen, streaming TV-quality video?**

   Answer:

   The Commission has not specifically examined this new service. Generally, network providers should have the ability to offer consumers different speeds of service and plans with different quality of service guarantees. Some consumers are willing to pay more for a faster speed or higher quality of service. I should also note that traffic prioritization already occurs today. For example, voice is prioritized over data traffic, and video is prioritized over other data traffic.

5. **I am concerned that fully implementing the CableCARD rules immediately for the lowest-cost boxes will increase costs for consumers. Section 629 of the Communications Act requires FCC to establish rules regarding the commercial availability of navigational devices, such as set-top boxes. In Section 629(c), Congress required FCC to decide any request for waiver of these rules within 90 days after an application is filed. FCC has waited more**

than six months to rule on several waiver requests and took over eight months to rule on one. FCC's Media Bureau has claimed it can ignore Congress' 90-day directive when it stated "requests for waiver for low-cost, limited-capability set-top boxes will not be considered under Section 629(c)." Will the Commission commit to having the full Commission decide all pending waiver requests within the timeframe set forth by Congress and to scheduling a prompt Commission vote on the one waiver that was denied at the Bureau level?

Answer:

The Commission's Media Bureau has not been ignoring Congress's directive, but rather has been acting within the statutory requirements set forth by Congress in ruling on the set-top box waiver requests. Specifically, Section 629(c) of the Communications Act explicitly states that the Commission shall only waive its set-top box rules under this provision when "such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products." To the extent that cable operators are filing waiver requests for *low-cost, limited capability* boxes, it is hard to imagine how such boxes would be "necessary" for "development or introduction of a *new or improved*" service as contemplated by Section 629(c). Thus, while cable operators are not barred from filing waiver requests for low-cost, limited-capability set top boxes pursuant to Section 629(c), we believe generally that waivers sought for such devices are more appropriately requested under the waiver policy articulated in the *2005 Deferral Order*.

Similarly, where digital cable services are already being provided by petitioners, waivers could hardly be "necessary" for the "introduction" of such services. Accordingly, because petitioners have not satisfied the showing necessary to warrant a review of their waiver requests under section 629(c), waivers for low-cost, limited capability set-top boxes have been evaluated under the waiver policy articulated in the Commission's *2005 Deferral Order* (that is, under our public interest waiver standard in Sections 1.3 and 76.7 of the Commission's rules). Notably, the 90-day time limit in the Section 629(c) does not apply to our general public interest waiver review.

Nevertheless, I am pleased to report that the Media Bureau has acted on all waiver requests filed prior to June 1, 2007. Where a waiver was not granted outright, many petitioners were given enforcement deferrals until September 1, 2007 to come into compliance with the prohibition on the distribution of integrated set-top boxes. Some waiver requests continue to be filed after the July 1, 2007 deadline. We will process the remaining requests in a timely manner.

Finally, I would note that, in general, requests for waivers of the Commission's cable equipment rules routinely are handled at the Bureau level. Indeed, the Media Bureau has addressed requests for waiver of the ban on integrated set-top boxes in the past. *See, e.g., Bellsouth Interactive Media Services, LLC,* 19 FCC Rcd 15607, 15609 (M.B. 2004). Moreover, Comcast's waiver request was addressed and made to the Chief of the Media Bureau, and not to the full Commission. Any party that believes that the Media Bureau has incorrectly acted upon their petition is entitled to review by the full Commission. For example, Comcast availed itself of this right when it disagreed with the Media Bureau decision on its request for waiver. A Commission order affirming the Bureau's denial of Comcast's waiver request as inconsistent with the *2005 Deferral Order* has been released.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Anna G. Eshoo

1. **You have been trying to push cable operators to move to an "a la carte" business model for years, forcing them to offer each channel they have in their lineup separately. However, based on my discussions with the creators of the diverse programming available on cable, satellite, and other multichannel video, I have concluded it would be very difficult for most diversity or alternative programmers to survive in an a la carte world. Can diversity programmers possibly generate enough earnings in licensing fees and advertising revenues to endure under an a la carte model? It seems likely that a la carte would put most diversity programmers out of business and prevent countless more from getting off the ground. Do you agree?**

Answer:

I continue to believe that a la carte would provide consumers with the choices and control that they desire and also could allow cable subscribers to lower their ever-increasing cable bills, which have nearly doubled in the last decade. According to a recent Nielsen Media Research report, the number of television channels received by the average household in the United States has more than doubled in the last decade, increasing from 41.1 in 1995 to 104.2 in 2006. The average household, however, has increased the number of channels it watches only from 10.5 to 15.7. That means that, today, the average cable subscriber is paying for more than 85 channels that he doesn't want to watch in order to obtain the approximately 16 channels that he does.

I do not believe that a la carte would harm programming diversity. Indeed, a la carte, including the option of themed tiers, could make it easier for programming networks like the Black Education Network, Urban Broadcasting Company, and the Black Family Channel, which are valued by minority viewers, to enter the marketplace. Viewers of such channels could purchase the channels they desire without having to buy a large, expensive tier first, which lowers the price of entry for that channel. Moreover, under a la carte, advertisers would face less uncertainty about the makeup and number of consumers actually reached by their advertisements. This can be particularly valuable to new or small networks because advertisers may be more willing to buy advertising time on networks with proven popularity and the enhanced ability to target a particular audience, than they would on networks included in a bundle that have a wide distribution, but possibly few actual viewers.

A la carte also would be an important step toward leveling the playing field between independent programming voices – those not affiliated with the large broadcast, cable and satellite distributors – and competing channels that are owned by MVPDs. Under the current system, many MVPD-owned networks are bundled into the offerings not necessarily because viewers are demanding them, but because the distributor has a financial interest in maximizing their distribution. Under an a la carte system in which viewers do the choosing, those channels that do not benefit from a corporate parent will be able to attract viewers on a more equal footing.

Last year, the Commission issued a *Further Report On the Packaging and Sale of Video Programming Services to the Public* ("*Further Report*"). With regard to diversity of programming, the Commission concluded that: "the networks that have value to consumers will not always get carriage under pure bundling," (*Further Report* at 30 ¶ 66), and that a la carte or mixed bundling would "increase consumer choice," (*Further Report* at 36 ¶ 82; 53 ¶ 13), which "may then increase program offerings, especially those that appeal to a minority of the population."(*Further Report* at 53 ¶ 13).

A Congressional Research Service (CRS) report on the Commission's *Further Report* affirmed the *Further Report*'s conclusion by recognizing that: "a la carte pricing provides advertisers with more readily measurable data on the number and demographics of those households that value a network's programming sufficiently to purchase it," (CRS Report, March 30, 2006, at 9) and that, "given that Nielsen Market Research does not currently collect ratings data for a vast majority of small cable networks, the data provided by a list of actual purchasers could foster advertising on some of those networks." (CRS Report, March 30, 2006, at 9-10).

2. **I have heard complaints from industry that FCC's rules authorizing satellite carriers to provide "Ancillary Terrestrial Component" (ATC) services in their mobile satellite spectrum are not currently applied nondiscriminatorily in that some carriers are allowed to provide ATC over all or virtually all their spectrum while others are not. Satellite signals are limited by global and national regulations to very low power, and as a result, satellite telephony suffers from poor or nonexistent reception indoors and in urban areas where buildings and other structures can block signals. However, it is my understanding that one satellite company – Globalstar – is not given the same authority as its competitors to use its entire satellite spectrum to provide land-based services in conjunction with its primary satellite service. I also understand that Globalstar has asked to have that restriction removed. Do you plan to move forward on Globalstar's request?**

Answer:

In January 2006, the Commission authorized Globalstar – a Mobile Satellite Service (MSS) licensee – to provide an ancillary terrestrial component (ATC) as part of its service. As with all MSS licensees, Globalstar may only integrate ATC into its network in the spectrum in which it is licensed for satellite operations. Some of the spectrum on which Globalstar is currently authorized for MSS, however, is also shared in part with MSS operator Iridium, and also includes a number of incumbent terrestrial operations either in, or adjacent to, Globalstar operations in portions of the band, including Broadcast Auxiliary Services and Business Radio Services. Consistent with the Commission's rules for this spectrum and to ensure against interference to the other users in the same spectrum, the Commission authorized Globalstar to provide ATC in 11 megahertz of its spectrum. In July 2006, Globalstar requested that the Commission open a proceeding to examine ways to change the Commission's rules to expand Globalstar's ATC authorization to include all of the frequencies where Globalstar is authorized to operate MSS, including those frequencies Globalstar shares with other users and services. We have examined the record in this proceeding (RM-11339), and believe we can accommodate some but not all additional ATC authority for Globalstar as some of Globalstar's request would cause interference to other licensees. I plan to place on circulation shortly an item that addresses the technical issues raised with Globalstar's request.

Additional Questions from The Honorable Anna G. Eshoo

1. **I am concerned that FCC can repeal a congressionally enacted statute simply by failing to act on a forbearance petition. In other words, vital consumer protections and incentives for competition enacted by Congress can effectively be repealed simply by failure to act on a forbearance petition by a dominant carrier.**

    - **Does the Commission have any safeguards that require that a vote be a taken on a forbearance petition? Can the Chairman just refuse to take a vote and have the petition be granted? Would you support a FCC procedural rule to require that an up-or-down vote be taken on all forbearance petitions within the statutory deadline?**

Answer:

The Commission takes very seriously its obligation to faithfully implement the Communications Act of 1934, as amended, including the forbearance provisions codified in section 10 of the Act. As you know, section 10 establishes a process by which forbearance petitions "shall be deemed granted if the Commission does not deny the petition" within a maximum of 15 months. As will all statutory

deadlines, it has been the Commission's practice to circulate to all of the Commissioners draft orders addressing forbearance petitions no later than 21 days prior to the statutory deadline and to remind them of the statutory deadline at that time. In addition, Commissioners are regularly provided with lists of upcoming statutory deadlines for forbearance petitions. I have continued to follow that policy.

Pursuant to this process, while I have been Chairman, every forbearance petition has been preceded by an up-or-down vote.

Since I have been Chairman, only one forbearance petition has been deemed granted by operation of law. That petition, *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket No. 04-440* (Verizon Forbearance Petition), was "deemed granted" after the Commission, by a recorded 2-2 vote, failed to adopt a draft order that would have granted the petition in part and denied it in part.

I do not believe that there is presently a need for a procedural rule requiring an up-or-down vote on all forbearance petitions, as there has never been a grant or denial of a forbearance petition during my tenure as Chairman in the absence of such a vote. The Commission's current process for handling forbearance petitions is working well, and the circumstances surrounding the Verizon Forbearance Petition were unique, given that only four Commissioners were available to vote. Moreover, such a procedural rule would not have made a difference with respect to the Verizon Forbearance Petition since an up-or-down vote was taken in that case.

2. **The unfulfilled promise of the *'96 Telecom Act* was vigorous competition between the various Baby Bells in each other's traditional regions. Obviously, this type of competition rarely exists and the few remaining Bells only really compete against other modes of communication (cable, wireless, satellite, etc.). Why do you think Verizon and AT&T do not compete against each other for telephone or broadband access customers in the other company's regions? What are the barriers to entry that prevent such competition? Can any new entrant really hope to overcome those home field advantages?**

Answer:

The Telecommunications Act of 1996 directed the Commission to take action to remove statutory, regulatory, economic, and operational barriers to competition in telephone services, including local exchange service.

Verizon and AT&T do compete in the wireless and enterprise markets. The Act, however, has not led to direct competition between Verizon and AT&T in the traditional consumer market. In addition, several court decisions overturned the Commission's efforts to foster greater competition in the consumer market by new entrants, such as long distance providers and CLECs.

The Commission has adopted policies to encourage competition with traditional telephone services by new technologies. For example, in March the Commission's Wireline Competition Bureau issued an order clarifying that wholesale telecommunications carriers are entitled to interconnect with incumbent LECs in order to provide service to the wholesale carriers' customers, including new entrants such as cable and VoIP service providers.

3. **I am a strong supporter of public broadcasting, and I am pleased that these broadcasters are able to provide vital educational and informational programming for my constituents, including programming suited to children and adults of all ages and social and economic backgrounds. I believe it is critical as we move toward the Digital Television transition that viewers continue to have access to this programming over subscription video services including cable, satellite, and Internet Protocol (IP) video.**

   - **I understand that the large cable operators are carrying High Definition and multicast digital broadcast signals transmitted by public television stations pursuant to an agreement between cable and public broadcasters reached two years ago. Similarly, I understand that Verizon and the public broadcasters also have reached a strong digital broadcast carriage agreement. However, there are no comparable agreements with either DirecTV or Echostar, the nation's two principal satellite operators. Since direct broadcast satellite now accounts for 27 percent of multichannel video programming subscribers, it is unacceptable that there is no agreement for carriage of public broadcast digital signals. The Commission has an open proceeding on this subject that has languished for over six years -- when can we expect the Commission to bring a resolution to this issue?**

     Answer:

     In 2005 the Commission implemented satellite carriage requirements pertaining to carriage of both analog and digital signals in Alaska and Hawaii as mandated by the Satellite Home Viewer Extension and Reauthorization Act of 2004. As a result, satellite operators with more than five million subscribers must carry the digital signals of all local television stations in Alaska and Hawaii. The carriage requirement with respect to digital signals took effect on June 8, 2007, and provides that satellite carriers must carry the high definition digital signals of local

stations in these states and must carry the stations' multicast signals as well.

On the broader carriage issues, the Commission has several open proceedings including satellite carriage of digital broadcast signals and the carriage of digital broadcast signals to all cable customers, including analog cable customers. I hope to be able to circulate orders addressing these remaining carriage issues by the end of the summer.

4. **A public television that serves my constituents, KCSM in San Mateo, was fined $15,000 for airing an episode of the Martin Scorsese documentary, *The Blues*, which contains interviews with blues singers using profanity. According to the station, the same episode aired 737 times across the country, but KCSM was the only station fined, apparently because it was the only station whose broadcast was viewed by someone offended enough to complain to the FCC. Do you think it is fair to single out one broadcaster for punishment over the exact same program shown over 700 times nationwide? Is this a logical system of enforcement, and is it likely to lead to predictable outcomes for a station?**

Answer:

Pursuant to our enforcement policy, the Commission imposes forfeitures only against licensees of stations whose viewers filed a complaint with the Commission regarding a particular program. The Commission has found that such an enforcement policy: (1) demonstrates appropriate restraint in light of First Amendment values; (2) vindicates the interest of local residents who are directly affected by a station's airing of indecent and profane material; and (3) preserves limited Commission resources. *See Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 13299 ¶ 76 (2006). In particular, it is important to note that the Commission does not independently monitor the airwaves for indecent or profane material but rather responds to complaints received by the public.

- **In the wake of the FCC's fine against KCSM, the Commission declined to punish stations airing *Saving Private Ryan* even though the exact same language was used because deleting the words from the movie would have "diminished the ... realism" of the experience for viewers. Can you explain to me how the "realism" of dialogue from a fictional character in a theatrical movie is enhanced through coarse language while an actual person using the dialogue endemic to his culture is "gratuitous" in the eyes of the Commission?**

Answer:

As an initial matter, I note that the Commission's action regarding "Saving Private Ryan" was not "in the wake of the FCC's fine against KCSM." Rather the fine against Saving Private Ryan was issued in February 2005, preceding the Commission's action against KCSM which took place in March 2006.

The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium. As a result, when evaluating material, the Commission, consistent with U.S. Supreme Court precedent, undertakes a contextual analysis, *see FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978), and does not consider any particular word to be *per se* indecent. As Justice Stevens stressed in *Pacifica*, "indecency is largely a function of context," and "cannot be adequately judged in the abstract." *Id.* at 742.

With respect to the Commission's decision concerning "Saving Private Ryan," the Commission held in a February 28, 2005 order that the use of the "F-Word" (and other expletives and potentially offensive words) in the context of that particular historical depiction of World War II was, in context, not patently offensive and therefore not indecent or profane. The Commission held that contextual considerations were critical to the determination and that the complained-of material, in context, was not in any way intended or used to pander, titillate or shock, nor was it gratuitous. Instead, the Commission found the content was "[e]ssential to the ability of the filmmaker to convey to viewers the extraordinary conditions in which the soldiers conducted themselves with courage and skill [and] the reactions of these ordinary Americans to the barbaric situations in which they were placed. . . .[The content was] integral to the film's objective of conveying the horrors of war through the eyes of these soldiers, ordinary Americans placed in extraordinary situations." The Commission also noted that the material was not presented as family entertainment and parents had ample warning that the film contained material that might be unsuitable for children. These warnings were included in an introductory warning and by use of a voluntary parental code following each commercial break.

On the other hand, in March 2006, the Commission issued a Notice of Apparent Liability finding that material contained in the program "The Blues: Godfathers and Sons" was apparently indecent and profane. This program contained numerous uses of the "F-Word" and the "S-Word" and in this entirely different context the Commission concluded that the broadcast used the terms numerous times in a manner that was vulgar and shocking to the audience. To take just one example, in one scene, a hip-hop artist, while shopping in a record store, states: "This looks crazy! See

there? This is the kind of s--- I buy! I mean, my man is wearing pink gear – that s---, that s---- is crazy right there! I'm buyin' it." The Commission concluded that such material was gratuitous. It also considered and rejected the argument that such language was necessary to express any particular viewpoint. In addition, the program in question aired without any advisories or warnings to parents that the program contained language unsuitable for children, and the station did not use the voluntary industry ratings. Furthermore, the Commission has never indicated that language used by an "actual person" is exempt from our indecency definition, and such an exemption would lack any foundation in the law. Indecent language may be uttered by real-life individuals as well as fictional characters.

While the Commission proposed a forfeiture of $15,000 for the airing of this broadcast, it has yet to issue an order actually imposing such a forfeiture. Rather, the licensee in question has filed an opposition to the Notice of Apparent Liability with the Commission, and the Commission, after carefully considering all of the arguments presented by the licensee, will issue a final decision in this matter.

- **As a result of the Commission's confusing and unpredictable enforcement of its indecency rules, KCSM and other public TV stations are now posting disclaimers before broadcasting telecourses with renowned works of art containing nudity, or those with footage of aboriginal tribes. Self-censorship is also becoming more prevalent because there are no clear and definitive measures that broadcasters can use to determine if the programs they air are "indecent" and would subject them to a $325,000 fine. When will the Commission provide clear guidelines of what is indecent and what is not?**

  Answer:

  In 2001, the Commission issued a policy statement "to provide guidance to the broadcast industry regarding [the Commission's] case law interpreting 18 U.S.C. § 1464 and [its] enforcement policies with respect to broadcast indecency." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001). The policy statement laid out in detail the Commission's analytical approach and emphasized that the Commission's indecency decisions rested on two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition – that is, the material must describe or depict sexual or excretory organs or activities. And second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium. The

Commission further explained that the inquiry into whether material is "patently offensive" requires consideration of its "full context" and is therefore "highly fact-specific." Nonetheless, the Commission identified three principal factors that are significant to the agency's determination whether material is patently offensive: (1) the explicitness or graphic nature of the depiction or description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for shock value.

In the years since this policy statement was issued, the Commission has released numerous decisions that provide broadcasters with further guidance on the application of our indecency standard. Indeed, in 2006, when the Commission issued an order resolving hundreds of thousands of complaints alleging that various broadcast television programs aired between February 2002 and March 2005 were indecent and profane, the Commission noted that its decision would "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." *See Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 2664 ¶ 2 (2006).

5. **As a Member of the Committee on Energy and Commerce, I have been an advocate for a vigorously competitive communications marketplace that is open to new entrants and innovation to ensure consumer choice and diversity of service offerings. I believe that where regulatory burdens or entrenched competitors stand in the way of such innovation and competition, it is the role of government to eliminate these hurdles as required by the public interest.**

   Section 7 of the *Communications Act* was enacted in 1984 to address these concerns. Most notably, Section 7 sought to eliminate regulatory obstacles to new services and technologies, by requiring FCC to encourage the development of new services. Section 7 also provides a presumption that new services are in the public interest, and places the burden on those who oppose a proposal for a new technology or service to demonstrate that the proposal is inconsistent with the public interest. The purpose of this provision is to prevent entrenched incumbents from effectively stalling competition through the regulatory process. The statute also requires the Commission to determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed.

Since Section 7 of the *Communications Act* is so vital, I would like to get a better understanding of the Commission's efforts to implement it.

- **Do you believe that the one-year deadline imposed by Section 7 for a FCC decision on a petition or an application proposing a new service or technology supports the goals of promoting innovation and new services to the public, and providing additional competition in the marketplace?**

  Answer:

  Section 7 provides a useful tool for evaluating in a timely manner those applications and petitions for new technologies and services filed pursuant to this section.

- **In light of the Commission's internal goal of resolving telecommunications mergers within 180 days and the recent conclusion by the majority of the Commissioners that it is unreasonable for local cable franchising authorities to exceed more than 90 days in granting a competitive franchise for new video/broadband entrants, do you believe that Section 7's one year deadline for a FCC decision on a petition or an application proposing a new service or technology is reasonable?**

  Answer:

  I believe it is reasonable for Congress to determine that the Commission must act on Section 7 applications and petitions within one year.

- **Can you describe any past or pending petitions or applications where the Commission has in recent years affirmatively used the Section 7 requirement that opponents of a new technology or service have the burden of proof to demonstrate that such an application is inconsistent with the public interest?**

  Answer:

  The Commission is mindful of its obligation to encourage the provision of new technologies and services to the public, and has cited Section 7(a) for this proposition in a number of instances.

  In adopting service rules for Satellite Digital Audio Radio Services in 1997, the Commission noted that "opponents of a new technology, such as satellite DARS, bear the burden of demonstrating that it is inconsistent with the public interest." The Commission ultimately allocated spectrum for satellite DARS services and adopted flexible service rules. The petitions/applications that

initially prompted the rulemaking, however, were not filed pursuant to Section 7.

I also note that AirCell, Inc. filed a petition in 1997 pursuant to Section 7 in which it sought a waiver of certain Commission rules to provide air-ground voice and data services. The Commission granted the waiver in 1998 without expressly invoking Section 7 or addressing the burden of proof.

Recently, the Commission dismissed without prejudice an application filed by M2Z Networks to operate in the 2155 -2175 MHz band. In its petition for forbearance, filed four months after its initial application, M2Z argued that its application proposed a new technology and service under Section 7 of the Act. The Commission found that the application did not propose a "new service" or "new technology" falling within the scope of Section 7. The Commission found that "the technologies that M2Z proposes to use in the provision of wireless broadband internet access service – TDD, OFDMA, and AAT – are all proven technologies that have been deployed in other bands." Further, the Commission found that even if M2Z's application fell within the scope of Section 7, the six applicants for competing authorizations in this spectrum met the burden required under Section 7 to demonstrate that M2Z's proposal is inconsistent with the public interest by proposing to provide the same or similar services.

- **Can you provide information on any opportunities in this coming year that will provide the Commission the wherewithal to exercise its Section 7 authority and due process obligation to approve of pending applications for new technologies or services?**

  Answer:

  Recently, the Commission dismissed without prejudice an application filed by M2Z Networks to operate in the 2155 -2175 MHz band. In its petition for forbearance, filed four months after its initial application, M2Z argued that its application proposes a new technology and service under Section 7 of the Act. The Commission found that the application did not propose a "new service" or "new technology" falling within the scope of Section 7. Further, the Commission found that even if M2Z's application does fall within the scope of Section 7, the license conditions proposed by M2Z, including relatively slow transmission speeds and build-out requirements that fall short of the build out standards that the Commission has imposed in other contexts, did not support grant of its application under Section 7, and would not serve the public interest. Further, the Commission received multiple proposals for innovative use of this spectrum apart from the proposal by M2Z, and they deserve due consideration as well. For example, many suggested that the Commission should auction this spectrum, while still others suggest that due to the high demand for this spectrum we should consider unlicensed use of the

band. Each of these proposals has merit, and consideration of either would be inappropriately foreclosed by granting forbearance in this instance. The Commission plans to issue a Notice of Proposed Rulemaking shortly to address these issues and adopt flexible rules that will encourage the innovative use of this unique piece of spectrum.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Jay Inslee

1. **Half of the television station news operations in the United States have a news partnership with a newspaper and those partnerships exist across market size according to the Television Newsroom Partnership Survey conducted by Ball State University in 2005. According to the Ball State Report, "news directors report their partnerships frequently perform many functions associated with convergence: cross-promotion of partner's content and some sharing of daily news lineups." If the concern is that the public interest can better be served through efficiencies and synergies of cooperation, repeal or modification of the newspaper cross-ownership ban is not necessary to achieve this goal. In light of this Ball State report, how would a relaxation of the newspaper cross-ownership rule achieve greater efficiencies than currently permissible, and if a relaxation did increase efficiency of operation, would it be in the public interest?**

Answer:

As part of its 2006 media ownership proceeding, the Commission is committed to a thorough examination of the newspaper/broadcast cross-ownership rule and its impact on local news and information. The Commission conducted a study to examine the effect of newspaper cross-ownership on television news coverage using matched pairs of cross-owned and non-cross-owned television stations. This study, as well as nine other economic studies conducted under the Commission's auspices, were released to the public for review and comment on July 31st, 2007. Comments are due by October 1, 2007 and reply comments are due by October 16, 2007.

Also in connection with the review, we are conducting hearings around the country to solicit public comment and engage the American people in reviewing the status of the media marketplace. The Commission has already held four media ownership hearings in Los Angeles and El Segundo, California on October 3, 2006; Nashville, Tennessee on December 11, 2006; Harrisburg, Pennsylvania on February 23, 2006; and Tampa, Florida on April 30, 2007. Two other hearings are planned. The Commission announced that the fifth public hearing on media ownership issues will be held in Chicago, Illinois, on Thursday, September 20, 2007. Moreover, the Commission is in the process of completing a series of hearings on broadcast localism; the most recent localism hearing occurred in June 2007, and the Commission plans to hold a final localism hearing in the coming months in Washington, D.C.

Once the comment cycles regarding these studies is closed and the hearings are complete, we will be in a position to complete our current review of the media

ownership rules and to determine whether and to what extent the media ownership rules should be revised under the statutory standard.

2. **Several FCC officials have stated that the Commission's newspaper cross-ownership rules must be relaxed in accordance with *Prometheus Radio Project v. Federal Communications Commission* holdings. The Chevron Doctrine limits the court's ability to interpret agency decision making. To uphold any agency interpretation, the court may only conclude that the agency's interpretation was permissible or reasonable given that agency's statutory authority. The court in *Prometheus* reliably followed this doctrine and held that FCC's analysis in the relaxation of the newspaper cross-ownership rule was a "reasoned analysis." The *Prometheus* court could have similarly determined that a FCC decision to maintain the newspaper cross-ownership ban would be well reasoned if supported by the record. Do you believe that the *Prometheus* holding binds FCC into relaxing the current cross-ownership rule? Does the Ball State Report or any other report studying the newspaper cross-ownership rule support maintaining the current ban?**

   Answer:

   In its Report and Order in the 2002 biennial review of media ownership rules, the Commission concluded that, "a blanket prohibition on the common ownership of broadcast stations and daily newspapers in all communities and in all circumstances can no longer be justified as necessary to achieve and protect diversity. Although we continue to believe that diversity of ownership can advance our goal of diversity of viewpoint, the local rules that we are adopting herein will sufficiently protect diversity of viewpoint while permitting efficiencies that can ultimately improve the quality and quantity of news and informational programming." (Report and Order at para. 355).

   The *Prometheus* court affirmed the Commission's decision to eliminate the newspaper/broadcast cross-ownership rule, holding that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest." Additionally, the court upheld the Commission's determination that the prohibition was not necessary to protect diversity.

   Thus, the Commission would need to adopt new cross-ownership limits unless it determines that its previous conclusion was incorrect.

3. **Many of the Commission's policies, in particular the Digital Television (DTV) tuner requirements, appear to be working effectively to move forward the transition to DTV broadcasting. I am aware of only four requests for waiver of these DTV tuner requirements, all filed by small companies providing unique products to specialized consumers, such as medical**

facilities and hotels. The Commission has granted two of these requests; do you believe that Commission grant of the remaining two requests would serve the public interest without significant effect on the pace of the DTV transition?
Answer:

The DTV tuner requirement is intended to serve two purposes: 1) facilitate the DTV transition by promoting the availability of digital reception equipment in the retail market and 2) protect consumers by ensuring that their TV receivers will provide off-the-air reception of digital TV service when analog TV operations cease. Because of the importance of these goals, especially as the end of analog TV service approaches, the Commission looks very closely at the merits of requests for waiver of the tuner requirement.

As you note, of the four requests for temporary waiver that have been received, two were granted – for TV sets used in health care facilities. The other requests were for tuners used for television displays built into vanity (bathroom) mirrors (intended primarily for hotel use, according to the requester). One of these requests was withdrawn. The other request remains pending.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Ranking Member Joe Barton

1. **The Anti Deficiency Act requires government to have funds on hand before making financial obligations. There is an effort by some in Congress to exempt the USF program from the Anti Deficiency Act. That doesn't seem wise, since it eliminates what little fiscal discipline there is on the program. My understanding is that it also isn't even necessary, since the FCC now has enough money available to meet its obligations. Is that correct?**

   Answer:

   Absent an Anti Deficiency Act exemption, the Universal Service Administrative Company, which administers the Universal Service Fund (USF), is required to comply with the Anti Deficiency Act. At this time, the Commission staff estimates that the universal service program can continue to operate as it does today without triggering an Anti Deficiency Act violation. There is a possibility that a temporary increase to the USF Contribution Factor – approximately 0.1% – may be necessary to address a potential deficiency in late 2008 and again in late 2009.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Ranking Member Fred Upton

1. **The FCC adopted an 800 MHz rebanding decision in July 2004 to fix interference with public safety spectrum. What is being done to ensure that order is being implemented as quickly and effectively as possible? How is the re-banding process going? Are there any lessons from this process that are instructive for how the FCC approaches the 700 MHz band?**

Answer:

While the Commission has hoped to be further along, we remain committed to ensuring that 800 MHz rebanding is completed as quickly as possible while, at the same time, protecting full continuity of public safety operations during the transition.

The Commission recently reaffirmed its commitment in an Order issued on May 17, 2007, clarifying the standard for determining what licensee rebanding costs must be paid by Sprint. In the Order, the Commission ruled that in paying public safety's costs of rebanding, Sprint's reimbursement obligation is not limited to the absolute lowest cost under any circumstances, but Sprint must pay the "minimum cost necessary to accomplish rebanding in a reasonable, prudent, and timely manner." This standard takes into account not just lowest cost but all of the objectives of the proceeding, including timely and efficient completion of the rebanding process, minimizing the burden rebanding imposes on public safety licensees, and preserving public safety's ability to operate during the transition.

We believe that this Order has had a beneficial effect on the rebanding process. Nonetheless, significant work still lies ahead to ensure that the rebanding is successfully and timely completed. To that end, the Commission is scheduled to consider two items relating to rebanding at its upcoming agenda meeting on September 11, 2007. One of these items is an order that will address Sprint's obligation to clear spectrum to accommodate relocation by 800 MHz public safety licensees. The second item is a public notice that will establish new, expedited timelines and procedures for rebanding planning and implementation.

In addition to the actions being taken by the Commission, the Public Safety and Homeland Security Bureau (Bureau) is working closely with all 800 MHz stakeholders – public safety, Sprint Nextel, equipment vendors, and the Transition Administrator – to resolve contested issues and expedite the pace of rebanding activity. To date, the Bureau has issued over 25 orders and public notices resolving disputes and providing guidance to negotiating licensees that we expect to help speed ongoing negotiations.

The Commission also has devoted significant resources to ensure that rebanding takes place as soon as possible in the border areas. Specifically, resolving international spectrum allocation issues as soon as possible with Mexico and Canada that affect 800 MHz rebanding in the US-Mexico and US-Canada border regions is a high priority. In coordination with the State Department, we are engaged in intensive dialogue with both Canada and Mexico on these issues. We are also working closely with public safety planning groups in the border regions to be sure their needs are given priority in our international discussions.

The 800 MHz band reconfiguration process is divided into two stages: Stage 1 involves relocation of licensees (both public safety and non-public safety) from Channels 1-120 in the 800 MHz band, while Stage 2 involves relocation of licensees in the NPSPAC band from their current spectrum to the spectrum vacated by Channel 1-120 licensees. Overall, significant progress has been made towards completing Stage 1, but Stage 1 rebanding is not yet complete in some regions. The Commission is currently considering whether Sprint Nextel has met the interim benchmark that required it to complete Stage 1 rebanding in the first 20 regions on the rebanding schedule within the first 18 months of the rebanding period. Stage 2 relocation has also begun, but is proceeding more slowly. Negotiations between NPSPAC public safety licensees and Sprint Nextel have been more complex and time-consuming than similar negotiations in Stage 1. This has led to concerns regarding the feasibility of completing rebanding on the current timetable, and is one of the principal reasons that the Commission has sought to accelerate the negotiation process by issuing the May 17 Order described above and will take further action at its September 11 agenda meeting.

The Commission's priorities are to ensure that Stage 1 is timely completed later this year (at least in the nonborder areas), that Stage 2 moves forward at a more rapid pace, and that we accelerate the process where possible – but not at the expense of maintaining full public safety readiness to respond to emergencies during the transition.

With respect to 700 MHz, we note that the 700 MHz band does not present the same concerns regarding interference to public safety systems that occur in the 800 MHz band. At 800 MHz, interference was caused by the interleaving of commercial cellular and public safety systems in the same spectrum band. In the 700 MHz band, commercial and public safety systems are assigned to separate spectrum blocks, with guard bands to protect against interference. In its recent 700 MHz order, the Commission made certain changes to both the commercial and public safety portions of the 700 MHz band to encourage the development of broadband services. The Commission is not faced with the type of interleaving of commercial and public safety spectrum that occurred in the 800 MHz band.

Questions for the Record for Federal Communications Commission Chairman Kevin Martin
Submitted by Member J. Dennis Hastert

1. **Many television stations and newspapers are struggling financially as they compete for advertising revenues with the explosion of video channels and Internet media. Many of these stations and newspapers have been forced to cut their local presence and sacrifice news coverage to stay in operation. In this environment, how do the media ownership rules and the newspaper-broadcast cross-ownership ban improve localism and diversity of content?**

   Answer:

   The Commission has received many comments on this issue in our media ownership proceedings, including the 2006 ownership review proceeding. Proponents of cross-ownership indicate that joint news gathering resources allow economic efficiencies that can help newspapers and local television stations compete in an expanding and rapidly changing marketplace. In 2002 the Commission found that there is evidence that combining news gathering resources can lead to the production of more local news programming, particularly in smaller or rural markets. On the other hand, opponents of cross-ownership have stated that the newspaper/broadcast cross-ownership prohibition is necessary to preserve and promote viewpoint diversity and competition.

   While there has been an explosion of sources of news and information and advances in technologies used to deliver this information over the last thirty years, since the newspaper/broadcast cross-ownership ban was adopted, the number of daily newspapers has actually declined. At least 300 daily papers have stopped publishing since the cross-ownership rule was adopted. Newspaper circulation has declined steadily for more than 10 years. Large, well established newspaper publishers have not been immune, as shown by the recent sale of Knight Ridder and the ownership changes proposed for the Tribune Company. These economic developments have led to cuts in papers' newsgathering operations. For instance, the number of people working in the newsrooms of U.S. daily newspapers dropped 4.1 percent between 2001 and 2005.

   As part of the 2002 biennial review of media ownership rules, the Commission determined that a blanket ban on newspaper/broadcast cross-ownership was not needed to promote viewpoint diversity, and that efficiencies resulting from common ownership of a newspaper and a television station could promote localism by providing more and better news and information. The U.S. Court of Appeals for the Third Circuit upheld the Commission's 2003 decision to eliminate the absolute ban of the newspaper/broadcast cross-ownership rule, holding that "reasoned analysis supports the Commission's determination that the blanket ban

on newspaper/broadcast cross-ownership was no longer in the public interest." The court remanded the matter to the Commission to either justify or modify its revise its cross-ownership limits. Thus, the Commission would need to adopt new cross-ownership limits unless it determines that its previous conclusion was incorrect.

As part of its 2006 media ownership proceeding, the Commission is committed to a thorough examination of the newspaper/broadcast cross-ownership rule and its impact on local news and information. The Commission conducting a study to examine the effect of newspaper cross-ownership on television news coverage using matched pairs of cross-owned and non-cross-owned television stations. This study, as well as nine other economic studies conducted under the Commission's auspices, were released to the public for review and comment on July 31st, 2007. Comments are due by October 1, 2007 and reply comments are due by October 16, 2007.

Also in connection with the review, we are conducting hearings around the country to solicit public comment and engage the American people in reviewing the status of the media marketplace. The Commission has already held four media ownership hearings in Los Angeles and El Segundo, California on October 3, 2006; Nashville, Tennessee on December 11, 2006; Harrisburg, Pennsylvania on February 23, 2006; and Tampa, Florida on April 30, 2007. Two other hearings are planned. The Commission announced that the fifth public hearing on media ownership issues will be held in Chicago, Illinois, on Thursday, September 20, 2007. Moreover, the Commission is in the process of completing a series of hearings on broadcast localism; the most recent localism hearing occurred in June 2007, and the Commission plans to hold a final localism hearing in the coming months in Washington, D.C.

Once the comment cycles regarding these studies is closed and the hearings are complete, we will be in a position to complete our current review of the media ownership rules and to determine whether and to what extent the media ownership rules should be revised under the statutory standard.

2. **Can you explain the current funding crisis of the universal service fund? Do multiple providers receive compensation? What is a reverse auction and is it the most efficient way to solve the funding mechanism?**

Answer:

Unfortunately, the true mission of universal service, ensuring access to high quality communications services in rural areas of the country, is being overshadowed by the growth in the fund as a result of subsidizing multiple competitors to provide voice services in rural areas. This growth in the fund is caused significantly by competitive eligible telecommunications carriers

(competitive ETCs). Specifically, competitive ETC payments have been growing at a trend rate of 101 percent per year since 2002. In 2000 CETCs received $1 million in support. Based on recent USAC estimates, competitive ETCs received almost $1 billion in 2006.

The Federal-State Joint Board on Universal Service (Joint Board) is exploring whether a "reverse auction" mechanism could be used as the basis for distributing universal service high-cost support. A reverse auction could be used to solicit "bids," asking all carriers to compete on how little universal service funding they would need to provide service. I believe that reverse auctions could provide a technologically and competitively neutral means of controlling fund growth and ensuring a move to most efficient technology over time.

3. **Do you think Google's and Yahoo's search results and advertising practices are "discriminatory" because someone receives more favorable page placement by paying a fee? If so, would they violate network neutrality principles? Do you think "nondiscrimination" principles should apply to Google and Yahoo and other search engines that possess significant market power?**

Answer:

The Commission recently initiated a Notice of Inquiry seeking comment on broadband industry practices, including the types of issues that you raise. As part of the Notice of Inquiry, the Commission sought comment on whether it should incorporate a new principle of nondiscrimination and, if so, how would "nondiscrimination" be defined, i.e., how would it apply to search engines. The record in that Notice of Inquiry just closed on July 16, 2007.

4. **In 2002, the D.C. Circuit sent restrictive broadcast ownership rules back to the FCC because they were not justified based on the state of competition. The FCC then tried to revise the restrictions, but the 3rd Circuit sent those back, too, in 2004. As a result, the industry is still operating under broadcast ownership restrictions that the courts have found invalid. Can the FCC justify any broadcast ownership restrictions and, if so, when will we see them?**

Answer:

Section 202(h) of the Telecommunications Act of 1996 requires the Commission to periodically review its media ownership rules to determine "whether any of such rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest." In July 2006, the Commission released a Further Notice of Proposed Rulemaking ("Further Notice") initiating the 2006 review of the media ownership

rules pursuant to that provision. In the Further Notice, the Commission seeks comment not only on whether the ownership rules must be revised based on the statutory standard but also on how the agency should address the Third Circuit's decision in *Prometheus v. FCC*. In *Prometheus*, the Third Circuit reviewed the Commission's *2002 Biennial Review Order*, which addressed all six of the Commission's broadcast ownership rules, and affirmed some of the Commission's decisions while remanding others for further justification or modification. In particular, the court remanded the Commission's revision of the newspaper/broadcast cross-ownership rule for further justification or revision. While affirming the Commission's prohibition on mergers among the top-four TV rated stations in a market, the court remanded the revised numerical limits on TV station ownership in a market so that the Commission could support and harmonize its rationale. The Third Circuit stayed the operation of those revised rules during the remand. The court permitted the Commission's 2002 revisions to the local radio ownership rule to go into effect but remanded the numerical limits for further justification. In addition to calling for comment on these rules and the effect of *Prometheus* upon them, the Further Notice also incorporates a discussion of the D.C. Circuit's 2002 *Sinclair* decision. In that case, the court found that the Commission had not justified a prior decision to exclude non-broadcast media from its count of independent owners for the eight-voice threshold under the local TV ownership rule.

As part of its 2006 media ownership proceeding, the Commission is committed to a thorough examination of all our ownership rules. To that end, we commissioned 10 economic studies to evaluate the impact of media ownership. These studies were released to the public for review and comment on July 31, 2007. Comments are due by October 1, 2007 and reply comments are due by October 16, 2007.

Also in connection with the review, we are conducting hearings around the country to solicit public comment and engage the American people in reviewing the status of the media marketplace. The Commission has already held four media ownership hearings in Los Angeles and El Segundo, California on October 3, 2006; Nashville, Tennessee on December 11, 2006; Harrisburg, Pennsylvania on February 23, 2006; and Tampa, Florida on April 30, 2007. Two other hearings are planned. The Commission announced that the fifth public hearing on media ownership issues will be held in Chicago, Illinois, on Thursday, September 20, 2007. Moreover, the Commission is in the process of completing a series of hearings on broadcast localism; the most recent localism hearing occurred in June 2007, and the Commission plans to hold a final localism hearing in the coming months in Washington, D.C.

Once the comment cycles regarding these studies is closed and the hearings are complete, we will be in a position to complete our current review of the media ownership rules and to determine whether and to what extent the media ownership rules should be revised under the statutory standard.

5. **While the 3rd Circuit criticized most of the FCC's broadcast ownership decision, it did say eliminating the ban on newspaper/broadcast cross-ownership was justified. Might the FCC at least be able to get out a decision on that in short order?**

Answer:

The Commission is committed to conducting a thorough examination of its media ownership rules, including the newspaper/broadcast cross-ownership rule. In July 2006, the Commission opened the current media ownership review and solicited comment on the specific issues raised in the *Prometheus* decision.

As part of its 2006 media ownership proceeding, the Commission is committed to a thorough examination of the newspaper/broadcast cross-ownership rule and its impact on local news and information. The Commission conducted a study to examine the effect of newspaper cross-ownership on television news coverage using matched pairs of cross-owned and non-cross-owned television stations. This study, as well as nine other economic studies conducted under the Commission's auspices, were released to the public for review and comment on July 31, 2007. Comments are due by October 1, 2007 and reply comments are due by October 16, 2007.

Also in connection with the review, we are conducting hearings around the country to solicit public comment and engage the American people in reviewing the status of the media marketplace. The Commission has already held four media ownership hearings in Los Angeles and El Segundo, California on October 3, 2006; Nashville, Tennessee on December 11, 2006; Harrisburg, Pennsylvania on February 23, 2006; and Tampa, Florida on April 30, 2007. Two other hearings are planned. The Commission announced that the fifth public hearing on media ownership issues will be held in Chicago, Illinois, on Thursday, September 20, 2007. Moreover, the Commission is in the process of completing a series of hearings on broadcast localism; the most recent localism hearing occurred in June 2007, and the Commission plans to hold a final localism hearing in the coming months in Washington, D.C.

Once the comment cycles regarding these studies is closed and the hearings are complete, we will be in a position to complete our current review of the media ownership rules and to determine whether and to what extent the media ownership rules should be revised under the statutory standard.

I have not yet determined, in consultation with my fellow Commissioners, whether to address each ownership rule in a separate Commission decision or to address all of the rules in one comprehensive order.

6. **The Department of Energy, the North American Electric Reliability Council, and others have acknowledged that the electric power system is an integral component of our nation's critical infrastructure. Virtually all other networks, including telecommunications, depend on electric reliability to a considerable degree. Hurricane Katrina and other disasters have demonstrated this dependence vividly. Do you think telecommunications reliability is somehow more important than electric reliability, or do you agree that electric reliability is also essential? I ask these questions because I have some concerns about pole attachment policy. I think it's a good thing to encourage the deployment of broadband and other communications technologies, but I think we also need to make sure that the safety and reliability of our critical electric infrastructure is not jeopardized in the process. Electric utilities tell me that thousands of attachments are being made to their infrastructure without any prior notice to the utility and, therefore, without giving the utility a reasonable opportunity to evaluate the safety and reliability impacts of the attachment. I'm worried about the potential impact of this fact on electric reliability. What is the FCC doing to ensure that cable and telecom companies provide notice to utilities before attaching new wires and equipment on utility poles and that these attachments meet all relevant electric industry safety and engineering standards?**

   Answer:

   I agree that the safety and reliability of critical electric infrastructure is a paramount concern. Our work on telecommunications reliability should not come at the expense of other public safety systems. Your concern of unauthorized cable television and other attachments to utility poles across the country is an important one. In particular, section 224(f)(2) of the Act expressly authorizes utilities to deny access to their poles on a nondiscriminatory basis for reasons of safety, reliability and generally applicable engineering purposes.

   Our rules require that requests for access to a utility's poles by a telecommunications carrier or cable operator must be in writing. To the extent that companies are not complying with our rules, they are subject to enforcement action.

   The Commission generally has not received complaints on behalf of electric utilities regarding such problems. I understand that one electric utility has raised this as part of its response to a complaint filed by an attaching entity. I also understand that several utilities choose to pursue litigation regarding unlawful attachments under state law. However, the Commission is ready and willing to enforce its requirements should such utilities seek the Commission's involvement.

7. **Under current law (Sec. 224 of the Communications Act) cable TV companies benefit from a subsidized rate for pole attachments. I am not convinced that the cable industry needs to continue to receive a subsidized**

pole attachment rate at the expense of electric consumers. The subsidized rates were established in 1978 when the cable industry was considered a "fledgling" industry that needed help to compete. Today the cable industry is a multi-billion dollar industry. Do you think electric consumers –some of whom may have low incomes and not even subscribe to cable—should continue to subsidize multi-billion dollar cable companies?

Answer:

I agree with your concern and do not think electric consumers should be subsidizing multi-billion dollar cable companies. I have instructed the Wireline Competition Bureau to prepare an NPRM asking whether the cable industry needs to continue to receive a subsidized pole attachment rate at the expense of electric consumers.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Cliff Stearns

1. **As you are well aware, one of my primary goals of the Telecom Act of 1996 was to provide much needed local competition to the incumbent phone company. Ten years later, that goal is just starting to be realized. Facilities-based competition is taking hold for the provision of residential telephone service. In particular, facilities-based VoIP service is making the biggest inroads with just over ten million residential subscribers across the country. However, in order for this to be even more successful, VoIP providers need to interconnect their facilities to the facilities of incumbent local exchange carriers (ILECS). While competitive telecommunications carriers (CLECs) have the right to interconnect under Section 251 of the Act (and, you are to be commended for recently adding some clarity to the rights of wholesale carriers to interconnect for the purpose of providing service to VoIP providers), I'm concerned that you haven't made clear that ILECs have an obligation under Section 201 of the act to "establish physical connections" with any requesting carrier, including VoIP providers. When do you intend to clarify the rights of VoIP providers and the attendant obligations of ILECs with respect to VoIP providers?**

   Answer:

   I believe that, under the Communications Act, ILECs have an obligation to interconnect directly or indirectly with any requesting carrier, regardless of the technology that carrier is using, whether it be wireless or voice over IP.

2. **Much of the population still does not have cell phones in Florida and over 5% of the population has no access to phones (cellular or wireline) in their homes, thus continuing to highlight the need for widespread deployment of payphones. I hear from constituents that the FCC's rules for payments to payphone operators for coinless calls have not been ensuring that payphone operators receive fair compensation for those calls. In fact, I understand that since the FCC revised these rules in 2004, there have been a large number of carriers who have simply ignored their payment obligations and the FCC's compensation rules. I understand that in December the agency issued a notice of apparent liability to one carrier, Compass Global, which is a step in the right direction. But can you give me some assurance that the agency will continue to pursue actions against the other non-payers, and fulfill the mandate to ensure widespread deployment of payphones?**

Answer:

The Commission recognizes the importance of payphones and we are committed to enforcing the payphone compensation rules. The payphone compensation rules became effective on July 1, 2004. The Commission has taken enforcement actions against non-compliant carriers and continues to investigate other carriers. As you mentioned, on December 22, 2006, the Commission issued a Notice of Apparent Liability for Forfeiture against Compass, Inc., d/b/a Compass Global, Inc. (Compass). The Commission concluded that Compass has apparently failed to meet its statutory and regulatory obligations related to payphone compensation, and found Compass apparently liable for a total forfeiture of $466,000. More recently, on February 22, 2007, the Commission granted a supplemental complaint for damages filed by APCC Services, Inc. *et al.* (APCC) against NetworkIP, LLC, and Network Enhanced Telecom, LLP (Network). The Commission found that Network owed APCC payphone compensation and awarded APCC damages in the amount of $2,789,505.84 plus prejudgment interest.

In addition to enforcement actions, the Commission has taken steps to help payphone providers receive compensation by reminding carriers of their obligations to payphone providers. On September 13, 2006, the Commission's Wireline Competition Bureau released a Public Notice reminding carriers of their obligations under the payphone rules, and also reiterating that it will not hesitate to take enforcement action, including imposing forfeitures, should carriers fail to comply with their compensation and reporting obligations. The combination of enforcement actions and the Public Notice reminding carriers of their obligations are steps that the Commission has taken to ensure that carriers do not disregard our payphone rules and to encourage carriers to deploy payphones.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Lee Terry

1. **During the Senate Commerce hearing you made a point that the CETC fund was $1 million when you arrived at the Commission. Today, the CETC fund has grown to nearly $1 billion in size. The High Cost Fund has been capped in order to control the growth and with the CETC fund growing quarterly, what does the Commission have planned in order to control the CETC fund?**

   Answer:

   The Commission is currently considering a recommendation by the Federal-State Joint Board on Universal Service (Joint Board) to place an interim cap on the amount of high-cost support available to competitive ETCs. The Commission issued a Notice of Proposed Rulemaking seeking comment on this recommendation on May 14, 2007. I'm supportive of measures to try to contain the growth of the fund, which helps protect the ability of people in rural areas to continue to be connected. I continue to believe the right long-term answer is to move to a reverse auction methodology.

2. **There has been a lot of talk about Reverse Auctions as a method to distribute Universal Service Funds. Is the Commission prepared to relax the rules of carrier of last resort and other burdensome regulations that the current incumbent provider must oblige by?**

   Answer:

   The Joint Board is exploring whether a "reverse auction" mechanism could be used as the basis for distributing universal service high-cost support. I believe that reverse auctions could provide a technologically and competitively neutral means of controlling fund growth and ensuring a move to most efficient technology over time. If the Commission moves to a reverse auctions approach, determining the service obligations will be of fundamental importance.

3. **Do you believe that broadband should be a function of the Universal Service Fund?**

   Answer:

   I believe that a modern and high quality telecommunications infrastructure is essential to ensure that all Americans, including those living in rural communities,

have access to the economic, educational, and healthcare opportunities available on a broadband network. Our universal service program must continue to promote investment in rural America's infrastructure and ensure access to telecommunications services that are comparable to those available in urban areas today. The Joint Board is currently examining how, and to what extent, the federal universal service support mechanism could assist the deployment of advanced services, or at least the removal of barriers to such deployment, particularly in rural, remote and high cost areas throughout the country.

4. **A few weeks ago at the Senate Commerce Hearing you said that the Commission is taking steps to make wireless broadband an "information service." If broadband should be a function of Universal Service participation aren't we moving backwards on our commitment to broadband deployment?**

Answer:

In the *Wireless Broadband Internet Access Services Order*, the Commission held that an integrated offering of wireless broadband Internet access service and transmission is an information service. Nothing in the *Wireless Broadband Internet Access Services Order* forecloses the Commission's ability to use the universal service fund to support wireless or other broadband transmission services offered as a telecommunications service.

5. **What steps has the Commission taken to ensure that the E-Rate fund will continue to operate until Congress passes a permanent exemption from the ADA?**

Answer:

The Commission is committed to ensuring that funding for all of the universal service programs remains current and that the fund meets its commitments while also remaining compliant with the Anti Deficiency Act. Absent an Anti Deficiency Act exemption, the Universal Service Administrative Company, which administers the Universal Service Fund (USF), is required to comply with the Anti Deficiency Act. At this time, the Commission staff estimates that the universal service program can continue to operate as it does today without triggering an Anti Deficiency Act violation. There is a possibility that a temporary increase to the USF Contribution Factor – approximately 0.1% – may be necessary to address a potential deficiency in late 2008 and again in late 2009.

USAC could use roll-over funds – that is, money that has been collected and periodically rolled back into the schools and libraries program – to help ensure compliance with the Anti Deficiency Act should a potential shortfall materialize.

Absent an Anti Deficiency Act exemption, USAC would be required to utilize any funds, including rollover funds, to meet its commitments while also remaining complaint with the Anti Deficiency Act.

6. **Is the current criteria for determining multiple ETC's in the public interest?**

Answer:

I am concerned about the Commission's current policy of subsidizing multiple ETCs in rural areas. Before I became Chairman, I dissented from this Commission policy of using universal service support as a means of creating government-managed "competition" for voice services. As a result, the Commission's universal service rules now support multiple wireless networks providing services that for many consumers are effectively a complement, not a substitute, to the service already offered by the subsidized wireline incumbent local exchange carrier, leading to a dramatically increased universal service fund. I remain hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier to serve.

7. **What are your thoughts on the phantom traffic problem? Would you agree that solving the phantom traffic problem would be a good start to solving the larger inter-carrier compensation plan that the Missoula Plan seeks to do?**

Answer:

I agree that solving the phantom traffic problem would be a good start to solving the larger inter-carrier compensation issues.

8. **Does the Commission have a timeline for when you'll take up the Phantom Traffic interim proposal?**

Answer:

The Commission received a number of proposals seeking to address the phantom traffic problem. Comments, reply comments and *ex parte* filings were solicited and have been received regarding these proposals, and the Commission is considering the record in this proceeding.

9. Should consumers be protected in retransmission consent negotiations by being allowed to keep the signal on while the corporate entities negotiate?

Answer:

While I generally have concerns about intervening in private negotiations, I recognize that the failure of a broadcaster and an MVPD to reach a retransmission consent agreement harms not just the broadcaster and the MVPD, but all of the viewers affected by the removal of a station's signal from the MVPD system. As you allude to, under current law, a MVPD must drop a broadcast station immediately upon the expiration of retransmission consent. If Congress determines the retransmission consent process needs reformation, it could give the Commission the authority to order arbitration of retransmission consent disputes by the Media Bureau, and require carriage during the arbitration process. To ensure that such arbitration process reaches a fair result in the context of the broader media industry, the Commission also would need to be sure that it had the tools necessary to obtain similar pricing information from other broadcasters, cable operators, and programmers. Without access to such information, it would be difficult for the Commission to determine whether offers from either party are appropriate.

10. What good does it do for consumers in Omaha, Des Moines, Atlanta, St. Louis, etc. to go black while these negotiations continue?

Answer:

Under current law, a MVPD must drop a broadcast station immediately upon the expiration of retransmission consent. If Congress determines the retransmission consent process needs reformation, it could give the Commission the authority to order arbitration of retransmission consent disputes by the Media Bureau, and require carriage during the arbitration process. To ensure that such arbitration process reaches a fair result in the context of the broader media industry, the Commission also would need to be sure that it had the tools necessary to obtain similar pricing information from other broadcasters, cable operators, and programmers. Without access to such information, it would be difficult for the Commission to determine whether offers from either party are appropriate.

11. USF reform has been one of my highest priorities an last year along with Congressman Boucher I drafted HR 5072. When drafting HR 5072 we were very conscious to keep the cost of the program in check. We primarily kept the costs in check by doing three things (1) cap the fund (2) tighten up the ETC and (3) do away with the identical support rule and go to actual costs. The largest of the savings will be as a result of the actual costs rule and I

would like you all to comment on why after 10 years the FCC has not changed the identical support rule?

Answer:

I support the elimination of the identical support rule so that an ETC's support is based on its actual costs.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Mike Ferguson

1. **On May 11, 2006, Joseph R. Palmore represented the FCC before the U.S. Circuit Court of Appeals for the District of Columbia defending the FCC's decision not to eliminate the so-called "integration ban" on cable set-top boxes. In attempting to show how the FCC would implement the rule in a flexible and reasonable manner, he said, "it [the Commission] announced that it would receive waiver requests from cable companies that wanted to continue providing no frills, simple digital set-top boxes on an integrated basis. The Commission said it would be favorably inclined to view waiver requests for those boxes, [as] another way of controlling costs in this area, and, in fact, the Commission has already received such a waiver request from Comcast." Yet on January 10, 2007, the Commission, through its Media Bureau, denied the very same waiver request saying it was not the type of waiver request the Commission had invited.**

   As I compare this inconsistency, from my vantage point, either Mr. Palmore misled the U.S. Circuit Court of Appeals about the FCC's intentions or the Bureau made a decision directly inconsistent with Commission policy as reflected in his statement.

   Mr. Chairman, can you please clear up this discrepancy? And, assuming the Bureau action was inconsistent with Commission policy as represented to the Court, how soon do you plan to bring this matter -- and other pending waiver requests -- before the full Commission for a vote, from all appointed Commissioners, thereby definitively communicating the FCC position?

   Answer:

   Mr. Palmore's representation to the U.S. Court of Appeals for the District of Columbia Circuit concerning the Commission's policy closely tracks the *2005 Deferral Order* in which that policy was announced: "It is critical to the DTV transition that consumers have access to inexpensive digital set-top boxes that will permit the viewing of digital programming on analog television sets both during and after the transition. The availability of low-cost boxes will further the cable industry's migration to all-digital networks thereby freeing up spectrum and increasing service offerings such as high-definition television. Accordingly, as cable systems migrate to all-digital networks, we will also consider whether low-cost, limited capability boxes should be subject to the integration ban and whether cable operators should be permitted to offer such low-cost, limited capability boxes on an integrated basis." *2005 Deferral Order,* 20 FCC Rcd 6794, 6813-14 (2005) (emphasis added). In acknowledging that the Commission had on file a waiver request from Comcast Corporation, Mr. Palmore was simply informing the

Court that Comcast had sought a waiver pursuant to the policy announced in the *2005 Deferral Order*. At no point did he indicate that the boxes for which Comcast has sought waiver were, in fact, the kind of "low-cost, limited capability boxes" discussed in the *2005 Deferral Order*. His statements thus could not be plausibly read as predetermining the outcome of the Comcast waiver request before the Media Bureau had the chance to analyze it, nor would such authority fall within the purview of a trial attorney in the Office of General Counsel. All Mr. Palmore's statement to the court intended to convey was that cable television operators were in fact requesting waivers under the policy announced in the *2005 Deferral Order.*

Finally, I would note that, in general, requests for waivers of the Commission's cable equipment rules routinely are handled at the Bureau level. Indeed, the Media Bureau has addressed requests for waiver of the ban on integrated set-top boxes in the past. *See, e.g.*, *Bellsouth Interactive Media Services*, LLC, 19 FCC Rcd 15607, 15609 (M.B. 2004). Moreover, Comcast's waiver request was addressed and made to the Chief of the Media Bureau, and not to the full Commission. Any party that believes that the Media Bureau has incorrectly upon its petition is entitled to review by the full Commission. For example, Comcast availed itself of this right when it disagreed with the Media Bureau's decision on its request for waiver. A Commission order affirming the Bureau's denial of Comcast's waiver request as inconsistent with the *2005 Deferral Order* has been released.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Charles W. "Chip" Pickering

1. **In response to the question on the 30% cable operator ownership cap, you mentioned that the 30% cap would also apply to a telephone company's cable subscribership. How do you contrast this with AT&T's ability to offer voice, video, and broadband to a much larger subscribership?**

   Answer:

   The 30% horizontal ownership limit applies to any cable television system operator. To the extent that a telephone company is offering a cable video service, it would be subject to this ownership limit as well, and would not be able to obtain a larger subscribership.

   AT&T has filed a petition with the Commission asserting that its IPTV service is not a cable service, but the Commission has not granted that petition and it remains pending.

   Moreover, the telephone companies' current video subscriber bases are well below the horizontal limit. For instance, Verizon's new FiOS TV has nearly 500,000 subscribers, the most of any telephone company, but is well below the established 30% ownership cap.

2. **What is the rationale behind imposing a 30% horizontal cap on cable when broadcast networks can own local stations reaching up to 39% of the television households?**

   Answer:

   In the Cable Television Consumer Protection and Competition Act of 1992, Congress directed the Commission to establish a horizontal cable ownership limit "on the number of cable subscribers a person is authorized to reach." *See* Section 613(f)(1). The Commission's corresponding cable ownership cap is a limit on the actual number of customers a cable system may obtain.

   Congress also established the national broadcast television audience reach limit at 39%. This broadcast cap applies not to actual viewers but rather to potential viewers. The imposition of a 39% potential customer cable cap—like the broadcast 39% reach limit—would place a cap on the "reach" of cable companies and would need to include all homes passed not actual subscribers as the current cap provides.

3. How is re-adoption of the 30% cap consistent with the D.C. Circuit's opinion in Time Warner v. FCC?

Answer:

In response to challenges to the 30% horizontal rule, in *Time Warner Entertainment Co. v. FCC*, the D.C. Circuit held that Section 613(f)(1) of the Communications Act does authorize the Commission to establish a national cap on cable television ownership. The court stated, however, that the Commission failed to offer sufficient evidence or a theory of competitive harm justifying a 30% numerical limit. Since then, the Commission has sought comment on the status of the video programming market and on various proposals for a specific horizontal limit, most recently in 2005. The Commission has before it a draft order that responds to the D.C. Circuit's remand. Should the Commission determine that a 30% limit is the appropriate cap, that decision will be based on record evidence and a theory of harm, consistent with the court's directive in *Time Warner*.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Nathan Deal

1. **Please outline the authorities you believe rest with the FCC when negotiations over retransmission consent break down and non carriage occurs, depriving consumers' access to broadcast signals?**

   Answer:

   The Commission currently has limited authority to dictate or place limits on the terms of retransmission consent. The FCC concluded in 2000 that the Communications Act does not permit it to require agreement between parties to a retransmission consent negotiation, or to force them to do anything other than meet to negotiate "in an atmosphere of honesty, purpose and clarity of process." In that same order, the Commission addressed the suggestion made by certain parties that the insistence on cash payments in exchange for retransmission consent should be a *per se* violation of the good faith negotiation requirement. The Commission disagreed, stating that ". . . to arbitrarily limit the range or type of proposals that the parties may raise in the context of retransmission consent will make it more difficult for broadcasters and [programming distributors] to reach agreement. By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent."

2. **Do you think the current retransmission consent regime is currently designed such that it adversely affects small cable companies and small broadcast affiliates who may not have sufficient market power when negotiating with large broadcasters or multichannel video program distributors (MVPDs)?**

   Answer:

   The Commission's 2005 report concluded that, "overall, the regulatory policies established by Congress when it enacted retransmission consent have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals." (Report at para. 44). This conclusion was based on our evaluation of comments from broadcasters and MVPDs submitted for the report and previous Commission review of retransmission consent. The Commission has observed that "both the broadcaster and MVPD benefit when carriage is arranged – the station benefits from carriage because its programming and advertising will be carried as part of the MVPD's service, and the MVPD benefits because the station's programming makes the MVPD's offerings more appealing to consumers. Most importantly, consumers benefit by having access to such programming via an MVPD. Thus, as a general rule, the local television broadcaster and the MVPD negotiate in the context of a level playing field in which the failure to resolve local broadcast

carriage disputes through the retransmission consent process potentially is detrimental to each side." (Report at para. 44).

The Report also found that, "the retransmission consent rules are part of a carefully balanced combination of laws and regulations governing carriage of television broadcast signals, with the must-carry and retransmission consent regimes complementing one another." (Report at para. 45). Furthermore, "broadcast mandatory carry rights, which promote localism and ensure the viability of free, over-the-air television, complement the retransmission consent regime. Together, must-carry and retransmission consent provide that all local stations are assured of carriage even if their audience is small, while also allowing more popular stations to seek compensation (cash or in-kind) for the audience their programming will attract for the cable or satellite operator. Must-carry alone would fail to provide stations with the opportunity to be compensated for their popular programming. Retransmission consent alone would not preserve local stations that have a smaller audience yet still offer free over-the-air programming and serve the public in their local areas." (Report at para. 33).

3. **Some have classified the current retransmission consent regime as a "free market." How can they be considered "free market negotiations" when commercial broadcasters, who distribute their product free-of-charge over government provided spectrum, have out-dated statutory and regulatory advantages such as guaranteed carriage (must-carry), guaranteed placement on a must-buy broadcast tier, and non-duplication rules?**

Answer:

The retransmission consent rules are part of a carefully balanced combination of laws and regulations governing carriage of television broadcast signals, with the must-carry and retransmission consent regimes complementing one another. Broadcast mandatory carriage rights, which promote localism and ensure the viability of free, over-the-air television, complement the retransmission consent regime. Together, must-carry and retransmission consent provide that all local stations are assured of carriage even if their audience is small, while also allowing more popular stations to seek compensation (cash or in-kind) for the audience their programming will attract for the cable or satellite operator. Must-carry alone might fail to provide stations with the opportunity to be compensated for their popular programming. Retransmission consent alone might not preserve local stations that have a smaller audience yet still offer free over-the-air programming and serve the public in their local areas.

While I generally have concerns about intervening in private negotiations, I recognize that the failure of a broadcaster and a cable operator to reach a retransmission consent agreement harms not just the broadcaster and the cable operator but all of the viewers affected by the removal of a station's signal from their cable system. If Congress believes the retransmission consent process needs

reformation, it could give the Commission the authority to order arbitration of retransmission consent disputes by the Media Bureau, and require carriage during the arbitration process. To ensure that such arbitration process reaches a fair result in the context of the broader industry, the Commission would also need to be sure that it had the tools necessary to obtain similar pricing information from other broadcasters, cable operators and programmers. Without access to such information, it would be difficult for the Commission to determine whether offers from either party are appropriate.

4. **Do you believe that recent, unprecedented payments by cable operators to broadcasters for retransmission consent may result in higher bills for cable subscribers? When Congress passed the Cable Consumer Protection and Competition Act of 1992 giving commercial broadcasters retransmission consent rights, it was mindful of the effect these rights could have on the prices paid by cable and other MVPD subscribers. A provision was added that required the FCC, in implementing retransmission consent, to consider "the impact that the grant of retransmission consent....may have on the rates for the basic service tier" and to ensure that retransmission consent does not "conflict with the Commission's obligation ... to ensure that the rates for basic service are reasonable" (47 U.S.C. § 325(b) (3) (A)). Given the recent trend of cable operators being forced to pay for retransmission consent rights, what specific actions does the Commission intend to take to comply with its statutory requirement to ensure that retransmission consent does not conflict with your obligation to ensure that rates for basic service are reasonable?**

Answer:

I share your concerns about the rising fees paid by cable subscribers. The price of expanded basic cable service has increased more than 100 percent since the 1996 Telecommunications Act passed. At the current time, however, we have no evidence that the price paid by MVPDs for retransmission consent is skewing cable bills higher than does the price of non-broadcast MVPD programming. Indeed, the evidence in recent disputes indicates that the amount requested in retransmission consent negotiations is significantly less than the amount paid for significantly less popular cable programming. *See In the Matter of Mediacom Comm. Corp. v. Sinclair Broadcast Group, Inc.*, MO &O, rel. Jan. 4, 2007, noting that, "In addition, Mediacom itself pays between $.20 and $3.40 for forty-four of its cable networks and between $.20 and $.55 for twenty-seven of its non-sports, cable networks. The record also indicates that Sinclair seeks compensation at or below levels that Mediacom already pays other less highly rated programmers." Consistent with our obligation under Section 325(b)(3)(A) of the Communications Act, we will intend to closely monitor retransmission compensation and its impact, if any, on the rates charged for basic cable television service.

5. **Will you please recommend any legislative changes which you believe would improve the current retransmission consent regime?**

   Answer:

   If Congress determines that the retransmission consent process needs reformation, it could provide the Commission the authority to order arbitration of retransmission consent disputes by the Media Bureau, and require carriage during the arbitration process. To ensure that such arbitration process reaches a fair result in the context of the broader media industry, the Commission also would need to be sure that it had the tools necessary to obtain similar pricing information from other broadcasters, cable operators and programmers. Without access to such information, it would be difficult for the Commission to determine whether offers from either party are appropriate.

6. **What do you perceive would be the effect if Congress removed the requirement to include broadcast stations in the basic cable tier or allowed consumers to bypass the purchase of local TV signals when subscribing to a MVPD service?**

   Answer:

   I believe it would be unfair to allow subscribers to bypass the purchase of broadcast TV signals when they are not allowed to bypass the purchase of all of the other cable programming channels.

7. **Would granting MVPDs the right to negotiate with broadcast stations from neighboring designated market areas (DMAs) create a more free-market condition for negotiating retransmission consent as the local broadcast station would no longer have monopolistic powers?**

   Answer:

   I believe free over-the-air broadcasters have provided an important public service. Local television broadcasters serve their communities by informing the public through the reporting of local and national news, public affairs programming and the provision of emergency alerts and information. As a result, they have had unique obligations (e.g., public interest obligations such as the children's programming requirement and indecency restrictions) and unique privileges (e.g., must carry/retransmission consent and DMA/broadcast exclusivity).

   Recently, some broadcasters have increasingly complained of their public interest obligations, saying it puts them at a disadvantage. To the extent broadcasters no longer want unique obligations, neither should they have unique privileges.

8. **I understand that some would like to see the "white spaces" spectrum licensed and auctioned. Before the Senate Commerce, Science and Transportation Committee Chairman Martin outlined some concerns with that approach. I'd appreciate your thoughts on whether the spectrum should be licensed or unlicensed.**

Answer:

In managing the spectrum, the Commission has tried to strike a balance between the licensed model and the unlicensed model, determining which model to use based on all of the relevant circumstances. Generally, the licensed model tends to work best when spectrum rights are 1) clearly defined, 2) exclusive, 3) flexible, and 4) transferable. When these attributes are not present, potential licensees face uncertainty and may lack incentive to invest in a license or offer service. In those circumstances, the unlicensed model may better optimize spectrum access and utilization.

As I indicated in my testimony, I believe there would be significant difficulties in making this spectrum available on a licensed basis, such as the need to precisely define the rights of new licensees vis-à-vis existing licensed services, including wireless microphones. In the TV white spaces, the frequencies and amount of unused television spectrum in the TV bands will vary with location and could change over time as additional television stations are licensed or change frequency. In addition, the assignment of low power television stations is not scheduled to be complete by the end of the DTV transition in February 2009. Under existing rules, currently authorized DTV stations would be permitted to seek to changes in their operating frequencies after that date, which could complicate licensing of the white spaces spectrum, particularly if the Commission were to license the spectrum pursuant to auction. If licensed wireless operations were required to protect other types of licensees in the TV bands, then wireless licensees in the TV bands could potentially lose their ability to operate on some, or even all, of their authorized frequencies when new operations with higher allocation status are authorized to operate in the same area.

In view of all of the considerations, the Commission has suggested that these devices may be best suited for operation on an unlicensed basis.

9. **Is it not true that an unlicensed approach will result in an efficient and timely use of the spectrum?**

Answer:

While the licensed and unlicensed approach can result in an efficient and timely use of spectrum, in view of all of the considerations, the Commission has

suggested that these devices may be best suited for operation on an unlicensed basis.

10. Do the economic advantages and technical advances outweigh and inefficient and problematic auction of this spectrum?

Answer:

While the Commission has not made a final determination, in view of all of the considerations, the Commission has suggested that these devices may be best suited for operation on an unlicensed basis.

11. Mr. Chairman, both small cable operators and rural telephone companies have expressed concern with the so-called "integration ban." As I understand the rule, cable operators are prohibited from offering set top boxes to their customers that include an integrated security function. These operators believe that rural customers may be forced to pay $2-$3 more to lease a cable box, and rural telephone companies have stated that implementation of the ban "would serve as an additional barrier to the delivery of video services, and the extension of broadband services, to rural customers." Why is the integration ban necessary and how is it consistent with the Cable Consumer Protection and Competition Act of 1992? Would consumers save more money if the ban was waived for rural and non-rural service providers?

Answer:

Subsequent to the 1992 Cable Act, Congress passed the 1996 Telecommunications Act which required the Commission to "adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor." 47 U.S.C. § 549(a). The Commission, in implementing this requirement, "required MVPDs to make available . . . a security element separate from the basic navigation device (the "host device"). The separation of the security element from the host device permits unaffiliated manufacturers, retailers, and other vendors to commercially market host devices while allowing MVPDs to retain control over their system security. The Commission found that separating out the security function would generally enhance the portability of the equipment by increasing its market base, facilitating low-cost volume production and empowering new functionality and services." *2005 Deferral Order*, 20 FCC Rcd 6794 at para. 6. As Congress found in 1996,

when it first ordered the Commission to establish a competitive market for set-top boxes, in the long run consumers save money when there is more competition: "Competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality." *See* H.R. Rep. No. 104-204, at 112 (1995).

12. It is my understanding that the Commission has several petitions before it regarding pole attachment matters. Do you believe the Commission should act on these petitions, or do you believe the Commission should refrain from acting until Congress enacts appropriate Pole Attachment reforms?

Answer:

The Commission has before it several petitions for rulemaking on a variety of issues regarding the pricing and terms of access to pole attachments and rights of way pursuant to section 224. These include petitions filed by Fibertech Networks and the United States Telecom Association. The Commission should always defer to Congress's actions, including with respect to pole attachments; however, I have asked the Wireline Competition Bureau to prepare an NPRM examining these petitions and existing regulations to promote parity among broadband providers using pole attachments.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Mary Bono

1. **Recently, Congressman Radanovich and I introduced H.R. 436, which restricts any state or political subdivision from imposing any new discriminatory taxes on cell phone services, mobile service providers, and mobile service property during a 3 year period. Could you please share with the committee your thoughts on the impact discriminatory taxes have on the marketplace?**

Answer:

I believe the government should commit itself to exercising self-restraint in placing additional financial burdens on telecommunications generally, including on broadband and wireless. Currently, at every level, government too often sees telecommunications, including broadband and wireless, as a potential revenue stream. From federal, state, and local excise taxes - the kind of taxes traditionally reserved for decreasing demand for certain products such as alcohol and tobacco - to local franchise fees, which are sometimes designed to recoup more than the costs governments bear for such services as repairing streets, government imposed taxes actually discourage demand and therefore deployment. To truly help spur deployment, every level of government should be committed to minimizing and eliminating excess financial burdens.

Discriminatory taxes, those that apply to one technology but not another, are particularly problematic as they may skew the market in favor of one service over another potentially more efficient service. Taxes raise the total price paid by users for services, which reduces demand. Thus discriminatory taxes on mobile services are likely to impact the mobile operators adversely, reducing investment in new services and discouraging mobile service innovation. In addition, reduced wireless usage overall could retard U.S. productivity growth. Finally, having a patchwork of differing state and local taxes is likely to impose a significant administrative burden on mobile service providers, the cost of which will be born by both the firms and their customers.

2. **Chairman Martin, we had a hearing last week in this Subcommittee, where the NAB came to testify about the future of digital radio. And in his written testimony, the NAB witness stated that the terrestrial radio industry's opposition to a performance right for artists is, and I quote, "not intended to minimize legitimate concerns the recording industry may have about the need for copy protection." Now, I am aware that the Commission is attempting to finalize its permanent rules for HD radio service, and I look forward to the issuance of those rules. But the NAB's comment last week raises an interesting and important point that I want to explore with you. I understand that the FCC has adopted a transmission standard for HD radio known as "in-band, on-channel," or IBOC. Chairman Martin, do you know whether, *from a technical perspective only,* the IBOC standard precludes or in any way limits the implementation of a copy protection scheme that would protect against widespread piracy of music when transmitted over the HD radio band?**

   Answer:

   From a technical perspective, the IBOC standard does not appear to preclude the implementation of a copy protection scheme for terrestrial HD radio.

3. **Chairman Martin, going back to the NAB's testimony last week, the NAB characterizes copy protection for HD radio as a "legitimate concern". Do you share that view? And do you have any thoughts or suggestions as to how we might be able to implement copy protection for HD radio, either through legal means or industry agreement?**

   Answer:

   I believe that copy protection for HD Radio signals may be critical to the success of digital radio. In my opinion, an industry agreement that represents the interests of all the stakeholders would be the preferred solution. Failing that, however, a legislative solution would be required. As you know, when the Commission instituted a copy protection regime for digital television, the District of Columbia Circuit vacated the Commission's order, deeming such action to be outside of the Commission's jurisdiction.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member George Radanovich

1. **The Media Bureau has taken well beyond the 90 days allotted by Congress to make a decision on waiver requests from the integrated box ban. The Comcast denial took 266 days. As of March 14, 2007, the same day all of the Commissioners testified before our Subcommittee, the Charter request had been pending for 243 days, the Verizon request for 218 days, the NCTA request for 210 days, the Armstrong Utilities request for 128 days, the Sunflower request for 114 days, the RCN request for 99 days, the Suddenlink request for 99 days, the San Bruno request for 90 days, the Liberty Cablevision request for 90 days, the NPG Cable request for 90 days, and finally the Bresnan request for 85 days. All of these pending requests are currently over the time limit given to the Commission by Congress. Don't all of you believe it is time for the full Commission to step in and take a vote on these requests, which are critical to consumers?**

   Answer:

   The Commission's Media Bureau has not been ignoring Congress's directive, but rather has been acting within the statutory requirements set forth by Congress in ruling on the set-top box waiver requests. Specifically, Section 629(c) of the Communications Act explicitly states that the Commission shall only waive its set-top box rules under this provision when "such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products." To the extent that cable operators are filing waiver requests for *low-cost, limited capability* boxes, it is hard to imagine how such boxes would be "necessary" for "development or introduction of a *new or improved*" service as contemplated by Section 629(c). Thus, while cable operators are not barred from filing waiver requests for low-cost, limited-capability set top boxes pursuant to Section 629(c), we believe generally that waivers sought for such devices are more appropriately requested under the waiver policy articulated in the *2005 Deferral Order.*

   Similarly, where digital cable services are already being provided by petitioners, waivers could hardly be "necessary" for the "introduction" of such services. Accordingly, because petitioners have not satisfied the showing necessary to warrant a review of their waiver requests under section 629(c), waivers for low-cost, limited capability set-top boxes have been evaluated under the waiver policy articulated in the Commission's *2005 Deferral Order* (that is, under our public interest waiver standard in Sections 1.3 and 76.7 of the Commission's rules). Notably, the 90-day time limit in the Section 629(c) does not apply to our general public interest waiver review.

Nevertheless, I am pleased to report that the Media Bureau has acted on all waiver requests filed prior to June 1, 2007. Where a waiver was not granted outright, many petitioners were given enforcement deferrals until September 1, 2007 to come into compliance with the prohibition on the distribution of integrated set top boxes. Some waiver requests continue to be filed after the July 1, 2007 deadline. We will process the remaining requests in a timely manner.

I would note that, in general, requests for waivers of the Commission's cable equipment rules routinely are handled at the Bureau level. Indeed, the Media Bureau has addressed requests for waiver of the ban on integrated set-top boxes in the past. *See, e.g., Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15609 (M.B. 2004). Moreover, Comcast's waiver request was addressed and made to the Chief of the Media Bureau, and not to the full Commission. Any party that believes that the Media Bureau has incorrectly acted upon their petition is entitled to review by the full Commission. For example, Comcast availed itself of this right when it disagreed with the Media Bureau's decision on its request for waiver. A Commission order affirming the Bureau's denial of Comcast's waiver request as inconsistent with the *2005 Deferral Order* has been released.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Mike Doyle

1. **I understand that Verizon has filed a forbearance petition that affects local telephone competition in my district, covering Pittsburgh and surrounding communities. The Pennsylvania Public Utility Commission and Pennsylvania Office of Consumer Advocate both recently opposed the forbearance petitions on the grounds that they will harm consumers by reducing choices and raising rates. Will you assure me that as you consider these petitions, you will not do anything that will reduce choices or raise rates for residents of Pittsburgh and the surrounding communities?**

   Answer:

   Section 10 of the Act specifically directs the Commission to determine that "(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest," including the effects of forbearance on competition.

   In prior petitions seeking similar forbearance relief, the Commission found that the success of intermodal competition warranted the Commission's careful exercise of its forbearance authority. Notably, the relief granted was balanced and limited to the areas in which competitors had the most significant facilities. The Commission will carefully apply the section 10 framework to Verizon's forbearance petition to ensure the adequate protection of consumers and competition.

2. **A November 2006 GAO Report on special access found that those markets largely lacks competition, recommended that the FCC develop a better definition of "effective competition" and recommended that the FCC monitor more closely the effect of competition in the marketplace. In public statements since, however, you have insisted that the market is competitive. What actions should the FCC intend to take in the wake of the GAO report's recommendations in the next 60 days?**

   Answer:

   On July 9, 2007, the Commission released a public notice inviting parties to refresh the record in the special access NPRM, including specific questions that

parties should address. These comments will ensure that the record in this proceeding more accurately reflects current market conditions. I have already circulated an options memo to the Commissioners that will give the Commission the ability to act by the end of the year, if not sooner.

3. **What actions is the Commission taking to ensure reasonable rates, including wireless roaming rates, are enacted? Are these measures needed to ensure small, rural and regional carriers, who serve minority populations and people in remote areas, avoid exorbitant and discriminatory roaming rates?**

   Answer:

   The Commission recently clarified that automatic roaming is a common carrier obligation for commercial mobile radio service carriers, requiring them to provide roaming services to other carriers upon reasonable request and on a just, reasonable, and non-discriminatory basis pursuant to Sections 201 and 202 of the Communications Act.

4. **Several CLECs have recently filed a petition at the FCC regarding the issue of copper retirement to clarify the FCC's rules to require the FCC to establish a formal process to determine whether it serves the public and national security interest to retire copper loops. What are your thoughts on this matter?**

   Answer:

   In February 2003, the Commission took steps to deregulate broadband, making it easier for companies to invest in new equipment and deploy the high-speed services that consumers desire. At that time, the Commission established a framework for the retirement of copper loops and subloops that allowed carriers to retire copper, but only after a carrier first deployed fiber-to-the-home. The Commission explicitly stated, however, that it was not preempting state commission authority to ensure that copper retirements complied with state legal and regulatory requirements.

5. **It has come to my attention that fewer than 5% of licensed full-power television stations in the US are owned by women. Compared to the representation of women in other sectors of the business world, this is a disturbingly low number. It suggests that we have not done enough to diversify the ownership of our nation's number one source of local news and information. Are you interested in seeing more women own broadcast stations? If so, what have you done in your tenure to promote this goal?**

   Answer:

The Commission is committed to expanding opportunities for entry into media ownership and programming, as well as other communications services.

Part of the problem is the limited number of channels available in the broadcast television and radio spectrum bands and the high start-up cost of building a station. One possibility that would help small and independently owned businesses overcome financial and resource constraints is to allow them to enter the broadcast industry by leasing some of an existing broadcaster's spectrum to distribute their own programming. Conversion to digital operations enables broadcasters to fit a single channel of analog programming into a smaller amount of spectrum. Often, there is additional spectrum left over that can be used to air other channels of programming. Small and independently owned businesses could take advantage of this capacity and use a portion of the existing broadcaster's digital spectrum to operate their own broadcast channel. This new programming station would then obtain all the accompanying rights and obligations of other broadcast stations, such as public interest obligations and carriage rights.

The Commission currently is considering a Notice of Proposed Rulemaking that would allow small and independently owned businesses and licensees of digital television stations to enter into agreements by which the stations share some of their digital capacity with these entities. The entities would be treated the same as operators of other television broadcast stations and would provide their own over-the-air programming to viewers as a new television station in the market. An example of this type of arrangement is the deal reached by Latino Alternative TV (LATV) and Post-Newsweek that provides for carriage of LATV programming on the multicast channels of Post-Newsweek stations in Miami, Orlando, Houston, and San Antonio.

The Notice also invites comment on a proposal to allow "qualified entities" to purchase expiring construction permits and be allotted additional time to construct the broadcast facilities. In addition, the Notice seeks input on whether the Commission's "equity/debt plus" attribution rule should be waived or modified where doing so would assist qualified entities in acquiring or retaining an existing broadcast station, or building broadcast facilities authorized by a construction permit.

The Commission has taken some important steps to provide more opportunity in radio with the advent of the Low Power FM ("LPFM") service which provides a lower cost opportunity for more new voices to get into the local radio market. The Commission currently is considering the adoption of an Order that will establish measures to ensure that LPFM stations have reasonable access to limited radio spectrum. In addition, the Commission will open a filing window in October 2007 for the submission of applications to establish new noncommercial educational (NCE) radio stations. The procedures established by the Commission to select among competing NCE applicants awards points to new entrants that do

not have attributable interests in other media properties.

Section 257 requires the Commission to identify and eliminate regulatory barriers to market entry by small communications businesses, including those owned by minorities and women. Pursuant to this section, the Commission must submit periodic reports to Congress. In a report that is currently pending before my colleagues, we recommend that Congress enact such a tax certificate program. The Commission established a minority tax certificate program in 1978 and applied that program until it was terminated by Congress in 1995. The Commission's tax certificate program provided a number of opportunities for new entry and promoted diversity of the media. Congress could promote diversity and inclusiveness in the media by enacting a tax credit for those selling media properties to small and independently owned businesses.

The Commission also provides a range of outreach services to assist small businesses and new entrants, including those owned by women and minorities, to acquire radio and television broadcast stations. For example, the Commission's Office of Communications Business Opportunities (OCBO) promotes broadcast business and ownership opportunities for small businesses, including those owned by women and minorities by providing information on Commission public notices and new service opportunities to small businesses and other interested entities. OCBO also participates in conferences sponsored by organizations that promote and provide assistance to minority and women-owned communications entities. OCBO attends and participates in conferences organized by such entities as Women in Cable and Telecommunications whose mission is to develop women leaders in the communications industry. OCBO also participates in a number of other conferences including those organized by the Minority Media and Telecommunications Council, an organization that focuses on developing minority and women entrepreneurs and providing the necessary information and access to financial resources.

I also look forward to continuing to work with the rechartered Federal Advisory Committee on Diversity in the Digital Age to promote the ability of all Americans, including minorities and women, to participate in the communications industry. A full council meeting was held on May 29, 2007 and one is scheduled for Thursday, September 27th. Further, all three subcommittees, Outreach, Access to Capital and New Technologies have scheduled subcommittee meetings. The May 29, 2007 meeting included a discussion as to how the digital transition creates new opportunities for diverse spectrum use that results in new opportunities for minority applicants.

In addition, recently the Media Bureau granted applications to assign 5 FM stations and 1 AM station from Clear Channel to Great Eastern Radio, LLC. The stations are in the Lebanon-Rutland-White River Junction market. This is the first station sale of a grandfathered radio combination (involving one station over the FM subcap) under the small business "eligible entity" exception adopted as part

of the 2003 ownership rules revisions. Under that provision a qualifying small business may acquire a seller's entire grandfathered cluster. This acquisition by Great Eastern, a locally-based small business, will promote ownership diversity in the market. And because two other Clear Channel same market stations are being sold to a different buyer, the transaction also will result in increased local competition.

6. **I also understand from a recent study on female and minority ownership of broadcast stations that just 3% of licensed full-power television stations are owned by minorities. While minorities make up a third of the population, 3% is alarmingly low. What are you doing to update FCC data on the minority ownership of media and to find policy solutions that will allow more stations to be owned by minorities?**

Answer:

I agree these are troubling statistics. One of the three core goals that the Commission's media ownership rules are intended to further is diversity. We need to try to find more opportunities for diverse viewpoints to be heard.

Part of the problem is the limited number of channels available in the broadcast television and radio spectrum bands and the high start-up cost of building a station. The Commission has taken some important steps to provide more opportunity in radio with the advent of the Low Power FM ("LPFM") service which provides a lower cost opportunity for more new voices to get into the local radio market. The Commission currently is considering the adoption of an Order that will establish measures to ensure that LPFM stations have reasonable access to limited radio spectrum. In addition, the Commission will open a filing window in October 2007 for the submission of applications to establish new noncommercial educational (NCE) radio stations. The procedures established by the Commission to select among competing NCE applicants awards points to new entrants that do not have attributable interests in other media properties.

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The Commission looks forward to receiving recommendations from the re-chartered Federal Advisory Committee on Diversity in the Digital Age to promote the ability of all Americans, including minorities and women, to participate in the communications industry. The Advisory Committee has begun to develop "best practices" to address obstacles faced by minorities in obtaining access to capital and to identify opportunities for minorities resulting from new technologies. A full council meeting was held on May 29, 2007 and one is scheduled for Thursday, September 27th. Further, all three subcommittees, Outreach, Access to Capital and New Technologies have scheduled subcommittee meetings. The May 29, 2007 meeting included a discussion as to how the digital transition creates new opportunities for diverse spectrum use that results in new opportunities for minority applicants.

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7. **In a 2005 Wall Street Journal editorial, you stated that broadband providers are engaged in 'fierce competition'. However, according to your own reports 98% of the residential broadband market is dominated by regional cable-telecom duopolies. Do you consider a market where two companies have a 98% market share to be a competitive market? What have you done to promote competition in broadband in your time at the FCC?**

Answer:

There is no simple answer to the question of what is the minimum number of firms necessary for a market to be deemed competitive. In fact, economists have debated what it means for a market to be "competitive." In addition, economists have recognized that the competitiveness of a market depends not only on the number of firms in the market, but also on a number of other factors or characteristics of the market, such as whether demand is stable or growing or whether products are differentiated.

The answer to the question of what is the minimum number of firms necessary for a market to be deemed competitive, depends heavily on the characteristics of the market. These characteristics can include, but are not limited to, the degree of substitutability between products, cost of entry for new firms, and costs born by consumers of switching from one product to another.

The degree of substitutability between products offered by different firms is one of the most important market characteristics. The more consumers view products offered by different firms as identical, the fewer the number of firms are required to achieve competitive pricing.

Depending on the circumstances, even in markets with only two competitors, those competitors may compete aggressively against each other. For example, in the case of broadband access services offered to residential customers, a number of factors suggest that, even where only DSL and cable modem service are currently available, the DSL and cable modem service providers are behaving competitively against each other. Numerous DSL providers are offering reduced prices and steep promotional discounts. Cable modem service provider are responding with their own promotional discounts. Moreover, the ratio of price to maximum download speed has been dropping rapidly. Both DSL and cable providers are competing in non-price terms; they are offering faster speeds.

During my tenure as Chairman, I have worked to create a regulatory environment that promotes investment and competition in the broadband market. For example, wireless service is becoming increasingly important as another platform to compete with cable and DSL for broadband access.

The Commission has made a significant amount of spectrum available on both a licensed and unlicensed basis that can be used to provide broadband service in

municipalities, rural areas, and across the nation. For example, on the licensed side, we completed an auction of 90-megahertz of spectrum for advanced wireless services that generated the largest-ever receipts, totaling nearly 14 billion dollars. We have also taken steps to completely reconfigure nearly 200 megahertz of spectrum in the 2.5 GHz region to create new broadband opportunities.

On the unlicensed side, the Commission completed actions necessary to make available 255 MHz of unlicensed spectrum in the 5 GHz region – nearly an 80 percent increase – that will fuel the deployment of Wi-Fi well into the future. And, last fall, the Commission initiated a proceeding to resolve technical issues associated with "white spaces" so that low power devices designed to operate on unused television frequencies may reach the market with the completion of the DTV transition.

We will continue to encourage deployment of broadband from all providers using a variety of technologies. As wireless technologies become an increasingly important platform for broadband access, it is critical to ensure that there is adequate spectrum available for providing broadband service. Spectrum auctions will continue to be an important part of our strategy for facilitating the build-out of mobile broadband networks. For example, the upcoming auction of spectrum in the 700 MHz region is well-suited for the deployment of broadband services.

The Commission will continue to look for new and innovative ways to facilitate the deployment of broadband technologies.

8. **One pending FCC investigation of particular importance deals with video news releases. Tens of thousands of Americans have written to the FCC urging that these news-like promotional videos be clearly labeled. Independent reports show that video news releases are routinely incorporated into news programming, without any disclosure to viewers. I understand that one study reports that an uncut news release aired on the 10:00 news in my own district. What is the agency's timeline for completing its video news release investigation? Given the impact on news programming viewed by millions of Americans daily, should the agency expedite its investigation? Is there a need for Congress to clarify the importance of full disclosure of video news releases?**

Answer:

The Center for Media and Democracy (*CMD*) on August 7, 2006, filed a complaint claiming that certain licensees violated the Commission's sponsorship identification rules by broadcasting certain VNRs without disclosing the source of the material. In response to this complaint, the Enforcement Bureau initiated investigations of 42 entities, including 39 broadcast licensees, a nationally syndicated program producer, a local cable channel and a regional cable programmer, for possible sponsorship identification violations related to their use

of VNRs provided by various companies. All of the entities have responded to the Commission Letters of Inquiry.

On December 7, 2006, CMD filed a second complaint making similar allegations against additional licensees. In response to this complaint, the Enforcement Bureau initiated investigations of 49 entities, including 46 broadcast licensees, a permittee supplying programming to a foreign station pursuant to Section 325(c) of the Act, and two cable operators, for possible sponsorship identification violations. Letters of inquiry were sent to these entities, and responses from most of these entities have been received. Five of the licensees requested additional time to submit their filing and are scheduled to submit responses on various dates in July 2007.

The Commission is carefully reviewing the evidence and plans to addresses these complaints as quickly as possible.

9. **I understand the FCC chose not use the Office of Personnel Management's standard form to gauge employee moods and attitudes, and used a custom form instead. Please explain this decision and provide the questions asked and the agency's results.**

Answer:

Because it is optional, the FCC did not participate in the Federal Human Capital Survey (FHCS) conducted by the Office of Personnel Management (OPM) in 2006. As permitted by OPM, the FCC chose instead to conduct our own survey rather than participate in the larger Government-wide survey. The FCC's internal employee survey was conducted in 2006 pursuant to the requirements of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136, 5 U.S.C. note) (the Act). Though not required, the FCC included all the questions and definitions prescribed by OPM regulations that became effective on January 1, 2007, in our 2006 survey. In addition, we asked agency unique questions as required by the Act. We note also that the results of the FHCS are reported by OPM at the agency level only. By conducting our own survey, based on employee self-identification of their Bureau/Office, we can gauge employee satisfaction at the Bureau/Office level rather than just the agency level. We think the Bureau/Office specific data are more useful in understanding employee concerns. Our survey also included the questions used by OPM to rank agencies in the areas of (1) Leadership and Knowledge of Management; (2) Results Oriented Performance Culture; (3) Talent Management and (4) Job Satisfaction. Attached is a comparison between our survey and the OPM survey and a copy of the responses to each of our survey questions. These results from our survey are also available on the FCC's public website under About the FCC - Employee Survey Results. *See* Tab 9.

10. I understand that union representatives are not able to communicate with all FCC employees via internal e-mail for matters of general relevance, such as reminding employees of the overtime rules, notices for an FCC-wide daycare feasibility study, and unionized employee award nominations? Is this the case, and if so, does this violate the Commission's negotiated agreement—that the union have reasonable access to electronic media?

Answer:

The National Treasury Employees Union (NTEU) Chapter 209, continues to maintain the negotiated right to communicate with all bargaining unit employees, non-bargaining unit employees, supervisors, and management officials in the FCC. The NTEU and FCC's Basic Negotiated Agreement (BNA) provides that "[t]he employer agrees to provide the Union reasonable access to the agency's electronic mail system to communicate with employees and Union representatives...." BNA Article 8, Section 10(B).

The FCC's Electronic Mail (e-mail) system provides all employees and contractors with an efficient way to communicate with others inside and outside the FCC using Commission computer systems. The FCC's e-mail system is intended for use to accomplish day-to-day official FCC activities, with incidental personal use permitted so long as it does not disrupt or otherwise interfere with official FCC business. Consistent with these provisions, NTEU Chapter 209 representatives have access to the FCC's e-mail system for the purpose of sending e-mail to bargaining unit employees, as well as non-bargaining unit employees, supervisors, and management officials. Additionally, the FCC created and provides NTEU with access to the e-mail group, "bargaining unit employees." Finally, all FCC employees have access to the FCC electronic Bulletin Board that can be used to post information of general interest, such as birth announcements, retirements, and merchandise for sale by FCC employees.

11. I believe placing employees "on detail" at other agency bureaus, divisions, Commissioner's offices and in Congress can be extremely valuable for both the Commission and the employee. On the other hand, the detail process could be used in less than positive ways. Has the FCC, however, placed employees "on detail" to avoid the union-negotiated transfer process?

Answer:

The FCC uses details to address temporary needs such as staff shortages of a temporary nature, exceptional volumes of work, to fill temporarily the position of an employee absent from work, to address temporary issues associated with changes in an organization, etc. The FCC does not place employees on detail to

avoid the "union-negotiated transfer process." When a bargaining unit employee is to be reassigned to a new position to meet a permanent need, the FCC follows the negotiated procedures for reassignments.

12. Have computer equipment or records containing employee's personal information, such as social security numbers, been lost or stolen? If so, have any FCC employees been the victims of identity theft possibly due in part to these lost or stolen records or computer equipment?

Answer:

Since I became Chairman, there has been one incident where two computers possibly containing personal information of Commission employees were stolen during a break-in. These incidents involved lap tops that had very limited personal information. Consistent with generally accepted Government practices then in effect, the Commission investigated the loss or theft of the computer equipment, and memorialized its findings in a report presented to the Commission's Chief Information Security Officer. There have been no incidents of identity theft reported as a result of these lost or stolen lap tops. In addition, since I became Chairman, there have been no instances of lost or stolen records containing employees' personal information, such as social security numbers.

13. Since 2005, have any non-medical professionals at the FCC accessed or attempted to access employees' health records at the FCC clinic? Is the FCC's health clinic fully HIPAA-compliant?

Answer:

Since 2005, no non-medical professionals at the FCC have accessed or attempted to access employee health records at the FCC Health Center. The FCC's health center does not electronically transmit health information and, therefore, is not a covered entity for purposes of HIPAA.

14. I understand there is a new process for inter-bureau staff communications instituted during your time as Chairman. What was the old policy, what is the new policy, when was it instituted and how does it enhance intra-agency dialog by removing barriers to communications?

Answer:

The Commission's inter-bureau staff coordination policy has not changed. Bureau staff and leadership routinely coordinate on items and share their expertise on the complex legal and technical issues handled by the Commission.

15. Did Commission staff ever ask Mr. Hatfield, verbally, by e-mail, or in writing about his outside clients prior to offering any contract?

Answer:

We are not aware of any such request from Commission staff that may have been made when the initial contract was entered into in 2001. In November 2002, however, Mr. Hatfield provided a partial list of clients by e-mail to the Commission's Office of Managing Director to verify the rates that he had charged to other clients. *See* Tab 10.

16. When the Commission contracts with others, does it have a formal process in place to obtain a list of its contractors' other clients? Is the Commission currently contracting with people who are also contracting with companies that lobby or are affected by Commission policy?

Answer:

While the Commission does not require contractors to submit a comprehensive list of all their other clients, the Commission does include a conflict of interest requirement in its service contract solicitations and service contracts. Although this requirement can vary by the type of contract, it generally requires contractors to avoid conflicts of interest, including the appearance of a conflict, and to notify the Commission of any potential conflicts of interest that might result from work performed on the contract. The Commission has in the past disqualified bidders due to such conflicts of interest.

I am presently aware of only one other Commission contractor that may have contracted with companies that lobby or are affected by Commission policy. Before I became Chairman, the Commission entered into a contract with the law firm of Kirkland and Ellis to provide the Commission bankruptcy expertise in connection with NextWave and other spectrum-related litigation. That contract required Kirkland and Ellis not to undertake representation of parties in any related matters, including related matters where the interests are adverse to the Commission. It did not, however, prohibit Kirkland and Ellis from representing parties that lobby or are affected by Commission policy.

With respect to all other outside contractors, I am not aware of any who contract with companies that lobby or are affected by Commission policy. It is possible, however, that some of the entities from which we buy products such as hardware

and software may have contracts with companies that lobby or are affected by Commission policy.

17. **In documentation provided to me after my initial inquiry on this matter, it is clear that there are two purchase orders for Dale Hatfield for "E-911," both dated June 2, 2006, one for $10,000 and the other $18,848. You have told Congress that Mr. Hatfield had billed for $9500 of the $10,000 contract, and thusly, should be nearly finished. Please explain why there were two contracts. When Mr. Hatfield was informed that he was not performing work under the $18,848 contract, but instead the $10,000 contract, did he tell the Commission that he would perform the remainder of the work required at no charge?**

Answer:

The two different amounts above, $10,000 and $18,848, represent two purchase orders under the same contract for E-911-related services. The $18,848 purchase order represented money available under the contract in Fiscal Year 2004; the $10,000 purchase order represented money available under the same contract in Fiscal Year 2005. The 2004 order was initially funded at $21,000, but was reduced to $18,848 for FY 2004. Mr. Hatfield, however, did not submit any invoices to the Commission for Fiscal Year 2004. An additional order was issued in September 2005 in the amount of $10,000. Mr. Hatfield ultimately billed the Commission $9,500 of the $10,000 budgeted for his task in 2005, and as such should have been in the very final stages of his work.

As described in an April 6, 2006 e-mail provided to you in connection with my April 13, 2007, response, Mr. Hatfield indicated to Commission staff that he could perform the task for the $10,000 amount. *See* Tab 11.

18. **You have told Congress that Mr. Hatfield gave a "brief presentation" of his work, but no "work product." Did either Bureau staff or your staff ever ask Mr. Hatfield for work product? If so, what was his response? Did Mr. Hatfield ever provide a substantive reason for the delay of his finished report? If so, what was the reason, and did the Commission express a desire that he stop the extra work and to submit what he had completed?**

Answer:

As indicated in my April 13, 2007 letter to you, in late May 2006, I learned about the existence of the new order from my personal staff and the fact that Mr. Hatfield was working on another report. My personal staff contacted Mr. Hatfield and asked him about the nature of his work and his proposed report. Mr. Hatfield declined to indicate to my personal staff what tentative conclusions, if any, he had

reached. He declined to provide a summary of his findings. He also declined to provide a draft of his proposed report to my personal staff at the time. To this date, Mr. Hatfield has not provided the Commission with a draft of his report or a copy of his conclusions in writing. Although we are not currently paying Mr. Hatfield for his advice, we would welcome any data he has compiled or reports he may have now finished.

With respect to whether "Mr. Hatfield ever provide[d] a substantive reason for the delay of his finished report," as detailed in his February 27, 2006 e-mail to Bureau staff, which was provided to you in April (*See* Tab 12), Mr. Hatfield indicated that, as of February 27, 2007:

- "I have most (probably three-fourths) of the interviews completed and I will complete several more this week while I am in DC."
- "Most important, by having me sign a non-disclosure agreement, APCO has agreed to allow me to attend a briefing [on March 4] for certain of their members on the results of their recent accuracy measurements in 7 localities...I anticipate that the briefing will enable me to get a much better, overall assessment of where things actually stand in terms of real world accuracy results."
- "I have drafted some of the early material in the report and have worked out a detailed outline for the remainder. Assuming I can complete the planned interviews by the end of next week and assuming that the APCO meeting goes well (in terms of not raising issues that I will need to investigate further), I should be able to work intensively on completing the report by the end of March."

19. **You have told Congress that one of the reasons your staff cancelled the report was that it was duplicative to the work that Bureau staff was performing. Aside from your announcement in the weeks after this second Hatfield report came to light, please describe that work?**

Answer:

In my response to your letter of March 13, 2007, I stated that at the time I learned of Mr. Hatfield's second report, the Commission had already acted on several 911 issues. For example, from December 2005 to March 2006, the Commission acted upon 38 E911 handset penetration deadline waiver requests, and was continuing to address implementation of the 911 rules adopted in June 2005 for interconnected voice over Internet protocol providers.

In my letter, I further stated that in March 2006 I announced plans to create a new Public Safety and Homeland Security Bureau that would focus on all of the various technical issues relating to E911, including the issues Mr. Hatfield had been examining. Given the recent Commission actions on VoIP 911 and pending wireless E911 issues, and my plans to

create the new Bureau, I concluded that it was not in the public interest to continue to pay an outside third-party to address wireless E911 issues.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Member Barbara Cubin

1. **What is the Commission's intent with regard to combinatorial bidding in the upcoming vote on service rules for the 700 MHz auction? The Commission stated commitment to using smaller geographic license areas for the 700 MHz auction seems at odds with recent comments regarding combinatorial bidding. If combinatorial bidding is allowed, will there be other protections in place for secondary markets to access this important spectrum?**

   Answer:

   In the recent 700 MHz Second Report and Order, the Commission announced that combinatorial (or "package") bidding could be used, but solely with respect to the one C-Block comprised of 12 large Regional Economic Area Grouping licenses– and not with respect to the 1,087 other 700 MHz licenses to be offered in the upcoming auction, including 734 small Cellular Market Area licenses that comprise the 700 MHz B Block. The variety of blocks and licenses not subject to package bidding provides other bidders with a wide array of other opportunities.

   With respect to secondary market rules, package bidding will have no affect on such rules applicable to the C Block licenses (or any other 700 MHz licenses). Secondary markets transactions would still be available for spectrum obtained pursuant to package bidding.

2. **Given the recent AT&T/Bell South voluntary merger conditions on special access rates- conditions which you claimed "have nothing to do with the transaction"- it appears the time has come to review the Commission's special access rules divorced from any merger proceeding. Can you commit to proceeding on special access orders in the near future, with a decision by the end of the year?**

   Answer:

   On July 9, 2007, the Commission released a public notice inviting parties to refresh the record in the special access NPRM, including specific questions that parties should address. These comments will ensure that the record in this proceeding more accurately reflects current market conditions. I have already circulated an options memo to the Commissioners that will give the Commission the ability to act by the end of the year, if not sooner.

3. **Has the Commission analyzed the AMPS (Advanced Mobile Phone Services) sunset date with regard to alarm radio devices? Can the Commission work with industry to ensure that the sunset date for alarm radio devices is feasible given the vast numbers of consumers who must wait for available technicians to make the transition?**

Answer:

In a recent order addressing the alarm industry's concerns, the Commission found that the alarm industry has sufficient time, personnel, and equipment to replace all analog alarm radios that are used as a primary communications path before the analog sunset date. The Commission also found that extending the sunset date could impede Phase II E911 deployment and the deployment of wireless broadband services to the public, including consumers in rural America. The Commission concluded that, on balance, the public interest would not be served by extending the analog service requirement beyond February 18, 2008. The Commission will continue to monitor the transition as the analog sunset date approaches.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by Chairman of Subcommittee on Telecommunications and the Internet
Edward Markey

1. **Has the FCC received any complaints about the absence of compliant V-chip technology in any consumer electronics devices, and in particular, television sets with digital tuners?**

   Answer:

   Commission staff have met with and received e-mails from the Coalition for Independent Ratings expressing concern that certain DTV receivers do not have the capability to respond to changes in the content advisory rating system. We have also received an e-mail from Tri-Vision expressing concern that certain digital converter boxes and other equipment that does not include a video display do not have V-chip capability. I have directed the Enforcement Bureau to investigate these claims.

2. **Has the FCC tested any TV sets with digital tuners since the March 1, 2006 deadline to ensure that these devices have V-chip technology that complies with the FCC's rules? If so, what were the results?**

   Answer:

   We have not performed tests on TV sets with digital tuners since the March 1, 2006 deadline to determine compliance with the V-Chip requirements. TV receivers are verified for compliance with the FCC rules by the manufacturer or other responsible party and are not routinely submitted to the FCC for approval or testing.

3. **If the FCC has not tested these devices to ensure V-chip compliance, does the FCC have plans to do so? If not, why not?**

   Answer:

   As noted above, we are currently investigating the compliance concerns that have been raised and will determine whether testing is necessary to ascertain compliance.

4. **Given that the FCC is working in conjunction with NTIA to test coupon-eligible converter boxes, has the FCC tested any of these devices for V-chip compliance? Does the FCC plan to do so, if it hasn't already? I realize that some boxes are still in the development process but we are interested in the FCC's plans to coordinate testing with NTIA.**

Answer:

As you know, Congress has designated NTIA as the lead agency in implementing the converter box program. The Commission has, however, entered into a Memorandum of Understanding whereby the Commission's Office of Engineering and Technology (OET) may review the manufacturers' converter box test results and, if necessary, test the converter boxes. We are working closely with NTIA in the review and testing of DTV converters boxes to determine compliance with the relevant requirements, including those pertaining to the V-chip. Pursuant to our MOU, NTIA has asked us to review and test certain DTV converter boxes. We have recently received the first ones of these in our Laboratory but have not yet completed our review or testing or those devices. As a part of this evaluation we will examine the devices for V-Chip compliance.

July 2, 2007

The Honorable Robert M. McDowell
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Mr. Commissioner:

Thank you for appearing before the Subcommittee on Telecommunications and the Internet on Wednesday, March 14, 2007, at the hearing entitled "Oversight of the Federal Communications Commission." We appreciate the time and effort you gave as a witness before the Subcommittee.

Under the Rules of the Committee on Energy and Commerce, the hearing record remains open to permit Members to submit additional questions to the witnesses. Attached are questions directed to you from certain Members of the Committee. In preparing your answers to these questions, please address your response to the Members who have submitted the questions and include the text of the Member's question along with your response. Please begin the responses to each Member on a new page.

To facilitate the printing of the hearing record, your responses to these questions should be received no later than the close of business **Friday, July 13, 2007**. Your written responses should be delivered to **316 Ford House Office Building** and faxed to **202-225-5288** to the attention of David Vogel, Legislative Analyst/Clerk TI. An electronic version of your response should also be sent by e-mail to Mr. David Vogel at **david.vogel@mail.house.gov** in a single Word formatted document.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact David Vogel at (202) 226-2424.

Sincerely,

JOHN D. DINGELL
CHAIRMAN

Attachment

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Edward J. Markey, Chairman
Subcommittee on Telecommunications and the Internet

The Honorable Fred Upton, Ranking Member
Subcommittee on Telecommunications and the Internet

The Honorable Gene Green, Member
Subcommittee on Telecommunications and the Internet

The Honorable Anna G. Eshoo, Member
Subcommittee on Telecommunications and the Internet

Questions for the Record
Subcommittee on Telecommunications and the Internet
Committee on Energy and Commerce
U.S. House of Representatives
to Commissioner Robert M. McDowell, FCC
Hearing with Federal Communications Commission
March 14, 2007

Chairman Dingell

Question 1: While the Commission has reclassified several services as Title I rather than Title II or Title III services, it has yet to ensure that the consumer protection rules and regulations that applied to Title II and Title III services will apply to the reclassified broadband services. During the hearing, the Chairman indicated that the Commission would endeavor to complete the pending proceeding addressing these issues before the end of the year. Please identify each of the consumer protections rules or regulations you believe should apply to broadband services offered to consumers.

The Commission has taken several important steps to assure that the ever-increasing number of VoIP service customers have the same protections, accessibility and features as traditional telephone service customers. Specifically, the Commission has required VoIP providers to comply with the following obligations: (1) provide emergency 911calling capabilities; (2) extend customer proprietary network information (CPNI) protections; and (3) provide individuals with disabilities accessibility to VoIP services and Telecommunications Relay Services (TRS) and 711 abbreviated dialing for TRS access.

In the pending *Broadband Consumer Protection Notice of Proposed Rulemaking* proceeding, the Commission is considering whether the following consumer protection requirements should be applicable to all providers of broadband Internet access services: (1) slamming, which protects customers from unauthorized changes in providers of telephone exchange service or toll service; (2) truth-in-billing, which would provide customers with accurate, meaningful information on their bills so they can better understand their charges and compare service offerings; (3) network outage reporting to the Commission for outages that affect customers or involve major facilities; (4) authority from the Commission and notice to customers before a carrier can unilaterally discontinue service; and (5) rate averaging requirements for rates of interexchange carriers charged to customers in rural and high cost areas. I look forward to considering the merits of applying these protections for the benefit of all consumers when the item is brought before the Commission.

The Honorable Gene Green

Question 1: Many of the large Silicon Valley search engine and web portal content providers who lobby for non-discrimination network neutrality rules say they want to prohibit network operators from offering faster service to certain content providers for a fee. However, it appears tbat many of these same content providers are already paying for faster service without any complaints. Instead of paying the network provider for faster service, they are paying companies like Akamai to position numerous local servers located around the country near the network providers last mile networks, to enable them to deliver their content faster than those who do not pay these server companies.

- **Is this kind of behavior legally distinguishable from network providers themselves offering faster service for a fee and acceptable to the individual Commissioners?**

This question regarding the net neutrality debate focuses on practices of content providers, rather than network providers. It is absolutely essential that broadband network and service providers have the proper incentives to deploy new technologies and retain the ability to manage them. However, it is equally as important that consumers have the option of pulling, or posting, the content of their choice anytime, anywhere and on any device. The Commission's focus has been on the network providers. We have received only one complaint where allegations were made that a carrier was blocking ports used for VoIP applications. In that instance, the Commission immediately instituted an investigation and entered into a consent decree, thereby resolving the alleged practices that affected customers' ability to use VoIP through one or more VoIP service providers.[1] Our action there signaled that we will not tolerate anti-competitive behavior.

In addition, on August 5, 2005, the Commission adopted a *Policy Statement* that set forth four broad principles designed "to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet." It specifically stated that consumers are entitled to: (1) access to Internet content; (2) run applications and use services of their choice; (3) connect legal devices that do not harm the network; and (4) competition among network providers, application and service providers and content providers. I believe that we have the ancillary authority under Title I of the Communications Act to enforce these principles. On March 22, 2007, we adopted a *Notice of Inquiry* to examine the status of broadband market providers and how consumers' interests could be best protected. Comments have been filed and I am in the process of analyzing the comments to determine whether additional policies are warranted.

On the same day, we adopted an additional *Notice of Inquiry* to determine the current state of broadband deployment in the U.S., including the market, investment and technological trends of advanced telecommunications capabilities. We have now received comments and reply comments that I anticipate will refine our understanding of how to define advanced telecommunications capability, the status of deployment of broadband capability to all

[1] *In the Matter of Madison River Communications, LLC and affiliated companies,* File No. EB-05-IH-0110, Order, DA 05-543, rel. March 3, 2005.

Americans, the reasonableness and timeliness of the current level of deployment, and what actions can or should be taken to accelerate deployment. I am also analyzing these comments as part of the Commission's ongoing effort to measure and promote the deployment of broadband capability to all Americans.

The Commission will remain vigilant in protecting the continued availability of all types of content over the Internet for consumers. Should we receive information demonstrating anticompetitive conduct, I will urge the Commission to act swiftly and in the best interest of consumers.

Question 2: Another important factor to consider in network neutrality is peer-to-peer technology. Some analysts claim that peer-to-peer traffic, much of it arguably illegal file-sharing of copyrighted material, may take up over 50 percent of our current last-mile network capacity. Does FCC have any information on this?

I understand that, in 2004, the Commission granted a pulver.com petition declaring that its Free World Dialup service, which provided users with information to establish peer-to-peer connections over the Internet, was neither "telecommunications" nor a "telecommunications service" as defined in the Communications Act, but was an unregulated information service, subject to the Commission's ancillary jurisdiction. I have not been informed by the Chairman's office or the Wireline Competition Bureau of any proceeding, including any complaints, pending before the Commission involving peer-to-peer traffic. It is my understanding that the Commission does not normally collect this type of information. However, as stated in response to Question (1) above, the Commission has initiated a *Notice of Inquiry* regarding the status of broadband market providers, which gives parties the opportunity to comment on broadband industry practices of all market participants. As I review the comments in this proceeding, I will analyze whether the Internet providers are acting consistently with the four principles designed to protect consumers set forth in the Commission's *Policy Statement.*

Question 3: With the announcement and beta launch of a new service called "Joost" and their content deal with Viacom, we are close to a commercial launch of a peer-to-peer, full-screen, streaming TV quality video-over-the-Internet service. Recently, one Google executive remarked that the Internet may not be able to handle this type of technology and that the Internet was not scalable to mass-use of full screen, TV-quality video.

Is our economic and regulatory framework for last-mile networks sustainable if a company can just buy some servers, connect to the Internet backbone, and compete with cable television by only paying for content and not the cost of investing in residential networks? Has the Commission examined this new service and how does it and similar new video-over-the-Internet services such as movie downloads affect the network neutrality debate? Does the Commission think that the Internet is scalable for mass use of full-screen, streaming TV-quality video?

As set forth in response to Question (1) above, I believe that we should provide the proper incentives to deploy new technologies so that consumers have the full benefit and use of those technologies. I also believe that we should not impose unnecessary regulation on such

offerings; rather we should seek the least amount of regulation for similar services. We must keep in mind that consumers do not buy fat pipes; they buy applications and content that require fat pipes. As consumer demand for more bandwidth-intensive applications and content increases, so does the incentive for network owners to provide more bandwidth, provided the market is competitive and unencumbered by unnecessary regulation.

Question 4: I am concerned that fully implementing the CableCARD rules immediately for the lowest-cost boxes will increase costs for consumers. Section 629 of the Communications Act requires the FCC to establish rules regarding the commercial availability of navigational devices, such as set-top boxes. In Section 629(c), Congress required the FCC to decide any request for waiver of these rules within 90 days after an application is filed. FCC has waited more than six months to rule on several waiver requests and took over eight months to rule on one. FCC's Media Bureau has claimed it can ignore Congress' 90-day directive when it stated "requests for waiver for low-cost, limited-capability set-top boxes will not be considered under Section 629(c)." Will the Commission commit to having the full Commission decide all pending waiver requests within the time frame set forth by Congress and to scheduling a prompt Commission vote on the one waiver that was denied at the Bureau level?

Chairman Martin has circulated to the full Commission an order that addresses Comcast's application for review of the Media Bureau's denial of its waiver request. I am considering the issues raised by the draft, particularly whether the subject set-top boxes would qualify for a waiver under Section 629(c) or the Commission's *2005 Deferral Order*, which permits requests for waiver for low-cost, limited-capability set-top boxes. I am also reviewing whether the Bureau orders applied the applicable waiver standards in an appropriately consistent fashion. I hope to cast my vote on the circulated order shortly.

The vast majority of waiver requests have been addressed by Bureau orders, the latest of which were released on June 29. With respect to the pending waivers, the Chairman will determine whether they are decided at the Bureau level unless Commissioners request a vote by the full Commission.

The Honorable Anna Eshoo

Question 1: I am concerned that FCC can repeal a congressionally enacted statute simply by failing to act on a forbearance petition. In other words, vital consumer protections and incentives for competition enacted by Congress can effectively be repealed simply by failure to act on a forbearance petition by a dominant carrier.

- **Does the Commission have any safeguards that require that a vote be taken on a forbearance petition? Can the Chairman just refuse to take a vote and have the petition be granted? Would you support a FCC procedural rule to require that an up-or-down vote be taken on all forbearance petitions within the statutory deadline?**

Section 10 of the Communications Act directs the FCC to forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of carriers or services, if the Commission determines that: "(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest." Section 10 also provides that a telecommunications carrier can file a petition for forbearance with the FCC and that such a petition is deemed granted if the Commission does not deny the petition within one year after it is filed, unless the Commission extends that period for an additional 90 days.

Action on a forbearance petition requires a majority of Commissioners to act to deny the request. The Commission is bound by the statutory provisions governing forbearance petitions. If, in the opinion of Congress, the operation of this statute is causing an undesired result, then it would have to be modified by Congress. I believe that requiring an up-or-down vote would fall into this category.

I was recused from each of the forbearance petitions that the Commission has acted on since my swearing in as a Commissioner on June 1, 2006 through May 31, 2007, due to my ethics agreement with the Office of Government Ethics as filed with the Senate Commerce Committee and by virtue of my former employer's participation in those forbearance proceedings. Therefore, I have no experience as a Commissioner upon which to base a position on process for considering forbearance petitions. However, now that my one-year recusal period has expired, I will weigh the merits of each forbearance petition that is brought to the Commission for decision against the statutory criteria for granting forbearance petitions and act consistently with those criteria. I do favor a substantive vote by the Commission on each forbearance petition.

Question 2: The unfulfilled promise of the *'96 Telecom Act* was vigorous competition between the various Baby Bells in each other's traditional regions. Obviously, this type of competition rarely exists and the few remaining Bells only really compete against other modes of communication (cable, wireless, satellite, etc.). Why do you think Verizon and

AT&T do not compete against each other for telephone or broadband access customers in the other company's regions? What are the barriers to entry that prevent such competition? Can any new entrant really hope to overcome those home field advantages?

Facilities-based competition requires infrastructure investment that is often substantial. Because of this, new entrants to the competitive marketplace have often required use of incumbents' facilities, at least for a portion of their networks. In such cases, the Commission has historically required that the underlying carrier's facilities are provided to competitors pursuant to the common carrier requirements of Title II of the Communications Act. Facilities-based competition both among and within platforms is budding. I am particularly optimistic that the 700 MHz auction and availability of spectrum in the white spaces of the TV broadcast bands will help deployment of broadband in rural areas. Last summer's Advanced Wireless Service (AWS) auction brought additional spectrum to the commercial market, giving winning bidders the flexibility to purchase spectrum in various geographic sizes and bringing the benefits associated with a competitive market to the American consumer. In addition, the Commission's video franchising decision adopted in December, 2006 should further stimulate deployment of fiber into communities that have never before had it. Such policies will also create positive and constructive disruption that will challenge complacency and force competition both within and outside of home territories. We must ensure that the Commission takes advantage of all opportunities to spur technological innovation and increased access to broadband services. Accordingly, we are making it easier for entrepreneurs to construct new delivery platforms more quickly and for the owners of existing platforms to upgrade their facilities. These policies should result in more competition among and within different broadband platforms and more choices for consumers.

However, despite these new opportunities, should market failure prevent new competitors from entering the market, Congress and the FCC should be prepared to rectify such failure through narrowly-tailored and sunsetted regulation. At the end of the day, competition should result, thus negating the need for further regulation.

Question 3: I am a strong supporter of public broadcasting, and I am pleased that these broadcasters are able to provide vital educational and informational programming for my constituents, including programming that suited to children and adults of all ages and social and economic backgrounds. I believe it is critical as we move toward the Digital Television transition that viewers continue to have access to this programming over subscription video services including cable, satellite, and Internet Protocol (IP) video.

- **I understand that the large cable operators are carrying High Definition and multicast digital broadcast signals transmitted by public television stations pursuant to an agreement between cable and public broadcasters reached two years ago. Similarly, I understand that Verizon and public broadcasters have also reached a strong digital broadcast carriage agreement. However, there are no comparable agreements with either DirecTV or Echostar, the nation's two primary satellite operators. Since direct broadcast and satellite now accounts for 27 percent of multichannel video programming subscribers, it is unacceptable that there is no agreement for carriage of public broadcast digital signals. The Commission has an**

open proceeding on this subject that has languished for over six years. When can we expect the Commission to bring resolution to this issue?

I also applaud the Association for Public Television Stations, the Public Broadcasting Service, the National Cable & Telecommunications Association and Verizon for reaching agreements that ensure carriage of public stations' digital multicast channels on the vast majority of the nation's cable systems and on Verizon's Fios TV. The news, public affairs, educational and children's programming offered by our nation's public television stations provide excellent service to our communities and enrich us all. The content produced on the multicast channels, both new programming and shows from public television's archives, is compelling viewing. I encourage the parties to reach an agreement for carriage of digital multicast offerings on DBS systems. Under current law, however, both cable operators and direct broadcast satellite (DBS) operators, the latter under a compulsory license regime, "must carry" only one signal from each local broadcast station. In my opinion, a privately negotiated agreement for carriage is the best way forward.

With respect to timing, the Chairman determines when to circulate proposals and draft orders to the full Commission. I defer to his answer regarding the timing of an order on DBS carriage.

Question 4: A public television station that serves my constituents, KCSM in San Mateo, was fined $15,000 for airing an episode of the Martin Scorsese documentary, *The Blues*, which contains interviews with blues singers using profanity. According to the station, the same episode aired 737 times across the country, but KCSM was the only station fined, apparently because it was the only station whose broadcast was viewed by someone offended enough to complain to the FCC. Do you think it is fair to single out one broadcaster for punishment over the exact same program shown over 700 times nationwide? Is this a logical system of enforcement, and is it likely to lead to predictable outcomes for a station?

As always, I am proceeding mindful of the need to enforce the law, while also considering the First Amendment protections and prohibitions on censorship and interference with broadcasters' freedom of speech. Reviewing the context in which the allegedly indecent content appears is always critical. Community standards are a factor as well. In First Amendment case law, the concept of "indecency" has always been connected with what is deemed patently offensive as measured by contemporary community standards. Our system of enforcement relies on the filing of complaints from members of the community in which a program airs. Local stations are better barometers of their communities than any national entity would be. For example, each station decides whether to air or preempt movies and other programs provided by the national broadcasting network. Although this system may not be perfect, it has a basis in case law and considers a local station's relationship with the community.

- **In the wake of the FCC's fine against KCSM, the Commission declined to punish stations airing *Saving Private Ryan* even though the exact same language was used because deleting the words from the movie would have "diminished the... realism" of the experience for viewers. Can you explain to me how the "realism" of dialogue**

from a fictional character in a theatrical movie is enhanced through coarse language while an actual person using the dialogue endemic to his culture is "gratuitous" in the eyes of the Commission?

Consideration of indecency complaints requires a delicate and difficult balancing of First Amendment interests, as well as the particular facts of a case. The words used and the context in which allegedly indecent content appears differ in every instance. And by necessity, the test to determine whether a scene is indecent is subjective. I hope that the Commission's decisions will provide some measure of guidance for the industry regarding what is appropriate for broadcast during hours in which many children are watching television.

- **As a result of the Commission's confusing and unpredictable enforcement of its indecency rules, KCSM and other public TV stations are now posting disclaimers before broadcasting telecourses with renowned works of art containing nudity, or those with footage of aboriginal tribes. Self-censorship is also becoming more prevalent because there are no clear and definitive measures that broadcasters can use to determine if the programs they air are "indecent" and would subject them to a $325,000 fine. When will the Commission provide clear guidelines of what is indecent and what is not?**

We have implemented regulations regarding enforcement of the statute prohibiting indecent material in 47 C.F.R. § 73.3999. The nature of the analysis of indecency requires us to review each instance as it is presented to us. Prospectively declaring what is indecent and what is not is very challenging. The enforcement of our indecency rules is a subject about which reasonable people disagree. As the father of three young children, I have a strong personal interest in carrying out Congress' indecency mandates. We will continue to use our best efforts to enforce the law on a case-by-case basis and will look to the courts for guidance. In early June, the U.S. Court of Appeals for the Second Circuit vacated and remanded our rulings on fleeting expletives used by Cher and Nicole Richie during the 2002 and 2003 Billboard Music Awards. The Court found that the Commission had violated the Administrative Procedure Act by failing to provide a reasoned explanation for tightening our policy regarding the broadcast of fleeting expletives. We are considering the path forward from that decision.

Question 5: As a Member of the Committee on Energy and Commerce, I have been an advocate for a vigorously competitive communications marketplace that is open to new entrants and innovation to ensure consumer choice and diversity of service offerings, I believe that where regulatory burdens or entrenched competitors stand in the way of such innovation and competition, it is the role of government to eliminate these hurdles as required by the public interest.

Section 7 of the Communications Act was enacted in 1984 to address these concerns. Most notably, Section 7 sought to eliminate regulatory obstacles to new services and technologies, by requiring FCC to encourage the development of new services. Section 7 also provides a presumption that new services are in the public interest, and places the burden on those who oppose a proposal for a new technology or service to demonstrate that the proposal is inconsistent with the public interest. The

purpose of this provision is to prevent entrenched incumbents from effectively stalling competition through the regulatory process. The statute also requires the Commission to determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed.

Since Section 7 of the *Communications Act* is so vital, I would like to get a better understanding of the Commission's efforts to effectively implement it.

- **Do you believe that the one-year deadline imposed by Section 7 for a FCC decision on a petition or an application proposing a new service or technology supports the goals of promoting innovation and new services to the public, and providing additional competition in the marketplace?**
- **In light of the Commission's internal goal of resolving telecommunications mergers within 180 days and the recent conclusion by the majority of the Commissioners that it is unreasonable for local cable franchising authorities to exceed more than 90 days in granting a competitive franchise for new video/broadband entrants, do you believe that Section 7's one-year deadline for a FCC decision on a petition or an application proposing a new service or technology is reasonable?**
- **Can you describe any past or pending petitions or applications where the Commission has in recent years affirmatively used the Section 7 requirement that opponents of a new technology or service have the burden of proof to demonstrate that such an application is inconsistent with the public interest?**
- **Can you provide information on any opportunities in this coming year that will provide the Commission the wherewithal to exercise its Section 7 authority and due process obligation to approve of pending applications for new technologies or services?**

I believe that the Commission should act as expeditiously as possible on Section 7 applications proposing new services or technologies. Congress has mandated that the Commission act on Section 7 applications within one year. Should Congress shorten that time frame, I would, of course, work diligently to ensure that the Commission is compliant.

As stated in response to Question (2) above, the Commission's video franchising decision adopted in December, 2006 extends benefits to new entrants and should further stimulate deployment of fiber. Imposing a 90 day deadline on local cable franchising authorities to act on competitive franchises was a means of facilitating competition and new services in the video and broadband markets. Congress has included a one-year deadline for Commission action on Section 7 applications. I will continue to do whatever I can to ensure Commission compliance with statutory deadlines.

Because the Chairman sets the Commission agenda, I refer the Committee to his office regarding the status and timing of action on pending petitions. It is beyond the scope of the Commission's jurisdiction to predict what applications for new technologies or services might be filed, I favor expeditious consideration of applications that hold the promise of bringing new technologies or services to the American consumer.

The Honorable Mike Doyle

Question 1: I understand that Verizon has filed a forbearance petition that affects local telephone competition in my district, covering Pittsburgh and surrounding communities. The Pennsylvania Public Utility Commission and Pennsylvania Office of Consumer Advocate both recently opposed the forbearance petitions on the grounds they will harm consumers by reducing choices and raising rates. Will you assure me that as you consider these petitions, you will not do anything that will reduce choices or raise rates for residents of Pittsburgh and the surrounding communities?

I will consider the merits of the Verizon petition, which was filed September 6, 2006, according to the three criteria set forth in Section 10 of the Communications Act. Those criteria include a determination that forbearance from the requested requirements will not harm consumers before a petition can be granted. Accordingly, not only is it good public policy to promote more consumer choice and lower rates through a competitive market, but such policy is the mandate of Section 10 as well.

Question 2: A November 2006 GAO Report on special access found that those markets largely lacks competition, recommended that the FCC develop a better definition of "effective competition" and recommended that the FCC monitor more closely the effect of competition in the marketplace. In public statements since, however, you have insisted that the market is competitive. What actions should the FCC intend to take in the wake of the GAO report's recommendations in the next 60 days?

The GAO special access report provided useful analysis of the effect of the Commission's pricing flexibility rules on competition that had not been undertaken before. The Commission has an outstanding rulemaking proceeding to determine what price cap rules should apply to special access services after 2005 and whether the pricing flexibility rules should be modified or repealed. In fact, on July 9, 2007, the Commission issued a Public Notice providing interested parties an opportunity to update the record, including comments on the GAO Study. In response to an inquiry from Chairman Markey, on June 11, 2007, I stated that I supported a brief refreshing of the special access docket and an effort to conclude the Commission's work on special access by September 15, 2007. While the Chairman of the Commission sets the agenda, I will do whatever I can to reach a timely decision on the outstanding issues in the special access proceeding.

While I have not reached any conclusion on the state of competition in special access, I believe that the Commission should fully consider the GAO findings as part of our review of the updated record and I will review that record and the positions of the various carriers, user groups and the analysis of GAO as I continue to formulate an opinion on special access issues and determine the best approach for addressing this issue.

Question 3: What actions is the Commission taking to ensure reasonable rates, including wireless roaming rates, are enacted? Are these measures needed to ensure small, rural and regional carriers, who serve minority populations and people in remote areas, avoid

exorbitant and discriminatory roaming rates?

Certainly it is important that all American consumers, no matter where they live, work or travel, have the ability to benefit from competitive wireless services. During the course of my tenure, I have met with a number of parties regarding wireless roaming obligations. I expect to meet with additional parties in the coming weeks given that this week the Chairman very recently circulated a draft order pertaining to roaming issues. I recognize and appreciate the complicated legal and economic factors involved, and I am pleased to have the opportunity to consider the Chairman's proposal.

Question 4: Several CLECs have recently filed a petition at the FCC regarding the issue of copper retirement to clarify the FCC's rules, specifically to require the FCC to establish a formal process to determine whether it serves the public and national security interest to retire copper loops. What are your thoughts on this matter?

The issue of copper loop retirement by incumbent local exchange carriers has been raised in two petitions for rulemaking filed in January 2007, which are currently pending before the Commission. The comment cycle is now complete. I am in the process of reviewing the entire record and will consider the merits of the relief requested with both the competitive consequences and the effect on the Congressional directive for redundancy in federal facilities firmly in mind.

Question 5: It has come to my attention that fewer than 5% of licensed full-power television stations in the US are owned by women. Compared to the representation of women in other sectors of the business world, this is a disturbingly low number. It suggests that we have not done enough to diversify the ownership of our nation's number one source of local news and information. Are you interested in seeing more women own broadcast stations? If so, what have you done in your tenure to promote this goal?

I am concerned about the decline in both female and minority owners of broadcast properties. A recent study by Free Press indicates that despite accounting for 51 percent of the U.S. population, women own only 6 percent of commercial broadcast radio stations. In contrast, women own 28 percent of all non-farm businesses outside of the broadcasting industry. I look forward to learning more about both the causes of this situation, especially as compared with other industries, as well as possible solutions. In December, 2006, the Commission re-chartered its own Advisory Committee for Diversity. I have been regularly meeting with various interested parties and I am eager to hear additional ideas as well. Also, I am interested in exploring the issues related to a new tax certificate program or other economic and regulatory incentives to promote ownership of broadcast properties by businesses that traditionally have not been well represented in the ranks of broadcast owners.

Question 6: I also understand from a recent study on female and minority ownership of broadcast stations that just 3% of licensed full-power television stations are owned by minorities. While minorities make up a third of the population, 3% is alarmingly low. What are you doing to update FCC data on the minority ownership of media and to find policy solutions that will allow more stations to be owned by minorities?

As discussed above, I have taken note of the decline in minority owners of broadcast stations. Chairman Martin has proposed a number of ideas in a notice of proposed rulemaking circulated to the Commissioners. I am considering those proposals, which include giving certain entities additional time to construct broadcast facilities and modifying our attribution rules to assist certain entities in acquiring or retaining a station. I am eager to hear the proposals of the Commission's re-chartered Advisory Committee for Diversity. Also, I am interested in exploring the issues related to a new tax certificate program or other programs to promote ownership of broadcast properties by economically disadvantaged businesses. However, under the Supreme Court's decision in *Adarand v. Pena* and successive cases (including the recent Seattle and Louisville school desegregation cases decided on June 28) government policies aiming to expand the opportunities of minorities have difficulty passing constitutional muster. We must consider these constitutional issues carefully while we work to devise a solution.

Question 7: In a 2005 Wall Street Journal editorial, Chairman Martin stated that broadband providers are engaged in 'fierce competition.' However, according to the Commission's own reports, 98 percent of the residential broadband market is dominated by regional cable-telecom duopolies. Do you consider a market where two companies have a 98 percent market share to be a competitive market? What have you done to promote competition in broadband in your time at the FCC?

We are witnessing facilities-based competition from across different platforms, including wireline, cable, and wireless with an increasing array of voice, data and video services. This year in particular the Commission is in an excellent position to ensure that the wireless marketplace is open to a wide variety of entities. We have been working hard to create new windows of opportunity for all types of spectrum license applicants, as well as unlicensed operators.

In March, the Commission's action to classify wireless broadband Internet access service as an information service created regulatory parity. This determination, which the Commission had previously taken for Internet access over cable modem, wireline and power line facilities, will maximize innovation and consumer benefits by ensuring that the market-driven framework established by Congress is fully realized as wireless services continue to flourish and evolve.

With respect to spectrum license applicants, the Chairman very recently circulated a draft order setting forth service rules and other policies pertaining to the 700 MHz band. As you know, Congress has mandated that this spectrum be auctioned no later than January 28, 2008. As a result, I am currently actively considering many ideas intended to stimulate meaningful opportunities, including, for instance, geographic market sizes, construction requirements, and possible incentives for the private sector to partner with public safety agencies.

Opening up the Lower and Upper 700 MHz Band for auction is America's best opportunity for spurring more competition in the broadband market. I believe that last summer's auction of Advanced Wireless Services provides excellent guidance as we design the band plan and implement the rules for the 700 MHz auction, and seek to further maximize opportunities for meaningful participation by a broad range of entities. Providing such opportunities will help

increase the chances of competition in the broadband market for the benefit of all Americans. The more players we have competing both between and within platforms, the better. Such competition will also spur untold economic growth.

With respect to unlicensed spectrum operators, last summer, the Commission commenced a proceeding regarding commercial deployment in the spectrum located in between the TV channels. At this time, the Commission's Office of Engineering & Technology (OET) is fully engaged in rigorously testing a number of protocol devices. I understand that OET is on-track for reporting these testing results later this month, and that the Chairman intends that the Commission finalize rules this fall. Of course, the technology innovation spurred by the Commission's leadership in the white spaces proceeding plays a critical role in the in the wireless marketplace, including fostering job growth and related business opportunities.

I am hopeful that our work to prepare for the 700 MHz auction and future deployment in the white spaces, along with the certainty created by our action to classify wireless broadband Internet access service as an information service, will broaden the opportunities available to entities seeking to enter the global wireless marketplace, whether as licensees or as unlicensed service providers.

Question 8: One pending FCC investigation of particular importance deals with video news releases. Tens of thousands of Americans have written to the FCC urging that these news-like promotional videos be clearly labeled. Independent reports show that video news releases are routinely incorporated into news programming, without any disclosure to viewers. I understand that one study reports that an uncut news release aired on the 10:00 news in my own district. What is the agency's timeline for completing its video news release investigation? Given the impact on news programming viewed by millions of Americans daily, should the agency expedite its investigation? Is there a need for Congress to clarify the importance of full disclosure of video news releases?

The Commission takes seriously its responsibility to enforce the law governing sponsorship identification. I am concerned about allegations that broadcasters are airing video news releases generated by public relations firms in the place of news reports. The Commission has underway two major investigations of possible sponsorship identification violations involving the use of VNRs. These investigations were prompted by complaints filed by the Center for Media and Democracy. Our Enforcement Bureau is analyzing the filings broadcasters have submitted in response to letters of inquiry and will be making recommendations to the Commission soon. I will continue to follow developments in these investigations and will reserve judgment until we have completed our review of the evidence.

The Honorable Nathan Deal

Question 1: Please outline the authorities you believe rest with the FCC when negotiations over retransmission consent break down and non-carriage occurs, depriving consumers' access to broadcast signals?

Section 325(b)(3)(C) of the Communications Act obligates broadcasters and multichannel video programming distributors (MVPDs) to negotiate retransmission consent agreements in good faith. The Commission's rules implementing this provision provide a two-part test for good faith. The first part of the test consists of a brief, objective list of negotiation standards, while the second part consists of a broader standard, under which the totality of the circumstances, rather than any particular violation of the objective standards, can constitute a failure to negotiate in good faith. Congress has not provided the Commission with authority beyond determining whether a broadcaster or MVPD has exercised good faith in its negotiations. Under current law, retransmission consent agreements are privately negotiated commercial transactions. I hesitate to have the Commission place its thumb on the scale in favor of either side. Private sector negotiations have been working for the vast majority of agreements. I am pleased that Mediacom and Sinclair Broadcasting reached a retransmission consent agreement on the eve of the Super Bowl. Their dispute, however, appears to me to be an exception, rather than the norm.

Question 2: Do you think the current retransmission consent regime is currently designed such that it adversely affects small cable companies and small broadcast affiliates who may not have sufficient market power when negotiating with large broadcasters or multichannel video program distributors (MVPDs)?

In any private sector negotiation, the bargaining power of a particular party depends on its unique circumstances. I do not think that the current retransmission consent regime disadvantages smaller companies any more than in other privately negotiated contexts. Moreover, smaller cable operators in particular have often banded together for retransmission consent negotiations, with the American Cable Association taking the lead in negotiations for groups of their members.

Question 3: Some have classified the current retransmission consent regime as "free market." How can they be considered "free market negotiations" when commercial broadcasters, who distribute their product free-of-charge over government-provided spectrum, have outdated statutory and regulatory advantages such as guaranteed carriage (must-carry), guaranteed placement on a must-buy broadcast tier, and non-duplication rules?

In adopting the mandatory carriage provision of the 1992 Cable Act, Congress recognized the importance of local television broadcast stations as providers of local news and public affairs programming to their communities. At that time, cable penetration of TV households was rapidly increasing and cable was competing with over-the-air television for advertising dollars, upon which TV stations relied for economic viability. Congress therefore

mandated carriage of the stations to ensure the continued economic viability of free local broadcast television. Congress also sought to strengthen the future of over-the-air broadcasting by giving broadcasters control over the use of their signals and permitting them to seek compensation from MVPDs for the use of that signal. For this purpose, the retransmission consent regime was born. Congress noted that it intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals" but did not intend "to dictate the outcome of the ensuing marketplace negotiations."[2] Thus, Congress' intention was to set up a marketplace, with certain protections to ensure the viability of broadcasting. Whether these statutory and regulatory provisions are outdated is the matter of much debate. I look forward to learning more about whether changes to current law are necessary. Based on the information I have about the status of current retransmission consent negotiations, however, the marketplace appears to be functioning well.

Question 4: Do you believe that recent, unprecedented payments by cable operators to broadcasters for retransmission consent may result in higher bills for cable subscribers? When Congress passed the Cable Consumer Protection and Competition Act of 1992 giving commercial broadcasters retransmission consent rights, it was mindful of the effect these rights could have on prices paid by cable and other MVPD subscribers. A provision was added that required the FCC, in implementing retransmission consent, to consider "the impact that the grant of retransmission consent... may have on rates for the basic service tier" and to ensure that retransmission consent does not "conflict with the Commission's obligation... to ensure that the rates for basic service are reasonable" (47 U.S.C. § 325(b)(3)(A)). Given the recent trend of cable operators being forced to pay for retransmission consent rights, what specific actions does the Commission intend to take to comply with its statutory obligation to ensure that retransmission consent does not conflict with your obligation to ensure that rates for basic service are reasonable?

Payments to broadcasters for retransmission consent, like other costs that MVPDs pay for programming, may result in higher bills for MVPD subscribers. However, by establishing the retransmission consent regime, Congress clearly intended to permit broadcasters to seek compensation, monetary or otherwise, from MVPDs for carriage of their signals. We must balance this right with our obligation to ensure that cable rates for basic service are reasonable. In our annual Cable Price Survey, we compile statistical information about the average rates for cable basic and expanded basic tiers of service in markets with varying levels of competition. We can continue to use this survey as a resource for analyzing the effects of retransmission consent on basic cable rates.

Question 5: Will you please recommend any legislative changes which you believe would improve the current retransmission consent regime?

I would not recommend any changes at this time. As I stated in response to Question (1), under current law retransmission consent agreements are privately negotiated commercial transactions in a marketplace created by Congress in the 1992 Cable Act. Private sector negotiations have been working for the vast majority of cable operators and broadcasters. I

[2] S. Rep. No. 92, 102d Cong., 1st Sess. 1, at 35 (1991).

hesitate to have the government intervene further by tipping the scale in favor of either side. Disputes that result in broadcast stations being dropped from cable carriage are extremely rare. The recent campaign for changes to the regime may be, in large part, the result of more broadcasters seeking monetary compensation for retransmission of their signals, as permitted by the statute.

Question 6: What do you perceive would be the effect if Congress removed the requirement to include broadcast stations in the basic cable tier or allowed consumers to bypass the purchase of local TV signals when subscribing to a MVPD service?

I have had meetings with a few parties who have interesting proposals for statutory changes to the retransmission consent regime. I am listening to these proposals with an open mind and would attempt to analyze the consequences, both intended and unintended, that any changes would have to the complex system of negotiation that is in place as a result of the 1992 Cable Act. Allowing consumers to bypass the purchase of local TV signals is an interesting idea. However, I would be concerned about those consumers losing the benefit of the local news and information provided by their local broadcast stations. I look forward to any guidance the Congress may have and continuing a dialogue about these issues.

Question 7: Would granting MVPDs the right to negotiate with broadcast stations from neighboring designated market areas (DMAs) create a more free-market condition for negotiating retransmission consent as the local broadcast station would no longer have monopolistic powers?

Current law does not permit MVPDs to import the signals of out-of-market stations except under certain special circumstances. Allowing broadcast stations to compete against each other for cable carriage seems to be more of a "free-market" idea, but the possible effect such a change could have on our nation's system of local broadcasting is difficult to predict. Local stations provide local information to their communities. What would be the impact of this change on local news and information? Would citizens gain or lose local content as a result of such competition? Also, when the retransmission consent regime began, monopoly power existed on both sides of the bargaining table. Local cable operators historically held monopoly power in the majority of areas and were able to dictate the terms of retransmission consent agreements. Effective competition from cable overbuilders, DBS with local channels and from telephone companies is a relatively new development. We should continue to examine the effects of that change.

Question 8: I understand that some would like to see the "white space" spectrum licensed and auctioned. Before the Senate Commerce, Science and Transportation Committee, Chairman Martin outlined some concerns with that approach. I'd appreciate your thoughts on whether the spectrum should be licensed our unlicensed.

Although the Commission is currently considering this issue in a pending proceeding, I have long advocated vigorously promoting widespread unlicensed use of the spectrum located in the "white spaces" between broadcast TV channels. By way of background, in June 2006, my first month at the Commission, we adopted a new equipment testing regime that facilitates

deployment of unlicensed devices, including mobile WiFi, which operate in the 5 GHz band. This testing regime is radically innovative in that it permits operation of these devices while, at the same time, ensuring that the devices not cause harmful interference to incumbent government users in the 5 GHz band. I am hopeful that the work to ease equipment roll-out in the 5 GHz band will be replicated as the Commission's Office of Engineering and Technology (OET) conducts its rigorous testing of consumer devices designed for deployment in the white spaces. I understand that OET is on-track for reporting these testing results later this month, and that the Chairman intends the Commission to finalize our rules this fall.

Question 9: Is it not true that an unlicensed approach will result in the efficient and timely use of the spectrum?

Yes, I believe that an unlicensed approach to the spectrum located in between the TV channels will result in the efficient and timely use of the spectrum. At the same time, it is important that the Commission do its part to ensure that new consumer equipment designed for use in this spectrum does not cause harmful interference to the current operators in the white spaces. I am confident that the private sector will meet this challenge.

Moreover, I believe that there are economic and technical advantages associated with an unlicensed approach. As a preliminary matter, there are inherent challenges associated with precisely identifying the underutilized spectrum in between the TV channels. Additional challenges would include the delay associated with such an exacting exercise, as well as the lengthy process for developing both the service rules for licensees and the associated procedures for auctioning the spectrum. I also am mindful of the fact that many of the services offered in this spectrum would operate secondary to those services currently offered. Thus, I am hopeful that a flexible, de-regulatory, unlicensed approach will provide opportunities for American entrepreneurs to construct new delivery platforms that will provide an open home for a broad array of consumer equipment.

Question 10: Do the economic advantages and technical advances outweigh an inefficient and problematic auction?

Yes, the factors discussed in Question 9 (immediately above), in their totality, mitigate any potential benefit of auctioning the spectrum located in between the TV channels and reveal the merit of moving forward to implement an unlicensed approach.

Question 11: Mr. Chairman, both small cable operators and rural telephone companies have expressed concern with the so-called "integration ban." As I understand the rule, cable operators are prohibited from offering set top boxes to their customers that include an integrated security function, These operators believe that rural customers may be forced to pay $2-$3 more to lease a cable box, and rural telephone companies have stated that implementation of the ban "would serve as an additional barrier to the delivery of video services, and the extension of broadband services, to rural customers." Why is the integration ban necessary and how is it consistent with the Cable Consumer Protection and Competition Act of 1992? Would consumers save more money if the ban was waived for rural and non-rural service providers?

Section 629(a) of the 1992 Cable Act requires the Commission to adopt regulations to assure the commercial availability to MVPD consumers of "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor." Congress intended to create a competitive market for navigation devices by ensuring that consumers have the opportunity to buy navigation devices from sources other than their MVPD.

To carry out the directives of Section 629, in 1998 the FCC required MVPDs to make available by July 1, 2000 a security element separate from the basic navigation device. Separating the security element from the host device (known as the "integration ban") would enable unaffiliated manufacturers, retailers and vendors to commercially market devices while allowing MVPDs to retain control over their system security. Separated security allows individual cable operators to design and operate equipment reflecting their particular security needs, while still facilitating the development of a market for consumer equipment that is geographically portable. Accordingly, a consumer would be able to choose a navigation device either from his MVPD or from devices available at retail that were manufactured by other companies. The Commission order allowed MVPDs to use devices with integrated security until January 1, 2005. This deadline was extended two times, until July 1, 2007.

Section 629(c) permits the Commission to waive its rules for a limited time upon a showing that the waiver is "necessary to assist the development or introduction of a new or improved multichannel video programming or other service."[3] In addition, in 2005, the Commission decided to invite petitions for waiver of the integration ban in order to preserve a low-cost, limited-capability set-top box option for consumers. The Commission determined that inexpensive set-top boxes are critical both to the DTV transition (so that cable consumers have a low-cost device for viewing digital broadcast programming on analog television sets both during and after the transition) and to the cable industry's migration to all-digital networks. The Commission's Media Bureau has issued orders addressing the vast majority of waiver requests filed with the Commission. Chairman Martin has circulated to the full Commission an order that addresses Comcast's application for review of the Media Bureau's prior denial of the Comcast's waiver request. I am considering the issues discussed in the draft, particularly whether the Bureau orders applied the applicable waiver standards in an appropriately consistent fashion.

Question 12: It is my understanding that the Commission has several petitions before it regarding pole attachment matters. Do you believe the Commission should act on these petitions, or do you believe the Commission should refrain from acting until Congress enacts appropriate Pole Attachment Act reforms?

Section 224(b)(1) of the Communications Act requires the FCC to regulate the pole attachments of all providers of telecommunications services and to ensure that the rates, terms,

[3] 47 U.S.C. § 549(c).

and conditions of pole attachment agreements are just and reasonable. By virtue of the current Commission rules, the formula for calculating the rates for different categories of providers results in three different rates. An outstanding petition for rulemaking to revise those rules is pending before the Commission. I believe that the petition for rulemaking and the comments filed in that proceeding should be evaluated in the context of the directive in Section 224(b)(1) of the Act and the effect of the current rules on promoting broadband deployment. While I cannot determine when the Commission will consider the rulemaking petition, I will fully evaluate the merits of this petition when it comes before the Commission for decision.

The Honorable Mary Bono

Question 1: Recently, Congressman Radanovich and I introduced H.R. 436, which restricts any state or political subdivision from imposing any new discriminatory taxes on cell phone services, mobile service providers, and mobile service property during a 3 year period. Could you please share with the committee your thoughts on the impact discriminatory telecommunications taxes have on the marketplace?

I fear that discriminatory or overly burdensome taxes could inhibit wireless broadband adoption, as well as the associated significant capital investment, just as consumer adoption is on a significant uptake. As set forth in the Commission's most recent High-Speed Services Report (Jan. 2007), as of this time last year, we had roughly 65 million high-speed "lines" in service. I use quotes on the word "lines" because the numbers for wireless services are particularly encouraging. Almost 60 percent of all new high-speed lines were mobile broadband wireless "lines." Mobile wireless broadband connections showed the largest percentage increase: from a mere 83,503 units at the end of 2005, to 1.91 million by mid-2006 – an astonishing 2,187 percent increase just six months. In fact, between June 2005 and June 2006, mobile wireless's share of total broadband lines rose from one percent to 17 percent. Making wireless services artificially expensive through unwise tax policies could reverse the beneficial trend of increased wireless adoption, lower prices and more powerful innovation.

The Honorable George Radanovich

Question 1: The Media Bureau has taken well beyond the 90 days allotted by Congress to make a decision on waiver requests from the integrated box ban. The Comcast denial took 266 days. As of March 14, 2007, the same day all of the Commissioners testified before our Subcommittee, the Charter request had been pending for 243 days, the Verizon request for 218 days, the NCTA request for 210 days, the Armstrong Utilities request for 128 days, the Sunflower request for 114 days, the RCN request for 99 days, the Suddenlink request for 99 days, the San Bruno request for 90 days, the Liberty Cablevision request for 90 days, the NPG Cable request for 90 days, and finally the Bresnan request for 85 days. All of these pending requests are currently over the time limit given to the Commission by Congress. Don't all of you believe it is time for the full Commission to step in and take a vote on these requests, which are critical to consumers?

I have consistently maintained during my time at the Commission that if hard deadlines are good for others, then they are good for the FCC itself. However, while we were not able to act on the waiver requests as quickly as I would have hoped, the 90-day period generally was not applicable to the waivers sought. Section 629(c) of the Act directs the Commission to grant waiver of its rules within 90 days upon a showing that the waiver is "necessary to assist the development or introduction of a new or improved . . . service."[4] The waiver applicants proposed to expand digital cable service, which does not meet this showing. Instead, the applications for waiver were evaluated by the Bureau under the FCC's *2005 Deferral Order,* which permits waivers for low-cost, limited-capability devices, and under the Commission's general waiver rules. The 90-day time limit in Section 629(c) does not apply to the Commission's waiver standards.

Chairman Martin has circulated to the full Commission an order that addresses Comcast's application for review of the Media Bureau's prior denial of the Comcast's waiver request. I am considering the issues raised by the draft, particularly whether the subject set-top boxes would qualify for a waiver under Section 629(c) or the Commission's *2005 Deferral Order* and whether the Bureau orders applied the applicable waiver standards in an appropriately consistent fashion. I hope to cast my vote on the circulated order shortly.

[4] 47 U.S.C. § 549(c).

FAILURE TO COMMUNICATE

By Jerry Brito
Wall Street Journal
March 13, 2007

For more than two decades, the Nation's first responders to emergencies have had to contend with radio communications that were not up to the task. Each time a major calamity such as the Oklahoma City bombing, 9/11 or Hurricane Katrina throws a spotlight on the problem, a blue-ribbon panel is convened. And each time the panel invariably offers the same prescription: more funding and more radio spectrum for public safety agencies.

It's no different this time around. Responding to the 9/11 Commission's recommendations, Congress has given public safety communications 24 MHz of the 80 MHz of electromagnetic spectrum that will become available as television migrates from analog to digital signals over the next 2 years. The rest is to be auctioned, and first responders will also get $1 billion in equipment grants from the proceeds of the auctions.

Senator John McCain has upped the ante, introducing legislation early this month to allocate half of the spectrum now slated for commercial auction to public safety. Meanwhile, a bill to implement the 9/11 Commission recommendations that recently passed the House and is right now being debated in the Senate, establishes yet another public safety-communications grants program that could cost billions.

But this kind of treatment has never solved the problem. It targets the symptoms, not the disease. First, responders often cannot communicate with each other because the Federal Government assigns to each of the 50,000 public safety agencies in the country—that's every hometown fire and police department—their own radio license and piece of the spectrum with which to build out a communications system. This is undoubtedly beneficial in so far as it affords localities great flexibility to build a system that best suits their needs. But it comes at a cost: More often than not the custom systems can't "talk" to each other.

Fortunately, the FCC has recognized the drawbacks of the old way of doing business, and in an ongoing proceeding it has put forth the idea of creating an interoperable, national broadband network, using 12 of the 24 MHz of spectrum that Congress has allocated for public safety.

Meanwhile, Nextel founder Morgan O'Brien has been pushing a new venture, called Cyren Call, to create a public-private network for first responders. His interoperable network would be built by the private sector, and first responders would subscribe to it just as consumers subscribe to cell phone networks. An added bonus: The capacity that public safety agencies don't use on the network would be available to commercial subscribers, increasing the network's overall customer base and thereby improving economies of scale.

This would be a terrific proposal, but for a couple of serious hitches. Cyren Call would build the network on 30 MHz of spectrum now designated for auction, but which would instead be sold to a nonprofit corporation at a discounted rate. The drawback? The Federal treasury would needlessly lose out on the revenue from an auction; and consumers would needlessly do without the new services and lower prices that commercial carriers would offer if that portion of the spectrum were sold at full market value. Why needlessly? Because, as the FCC proceeding affirms, a national broadband network for first responders can be built over spectrum already designated for public safety use.

Frontline Wireless, another private initiative, is backed by former FCC Chairman Reed Hundt. It involves building an interoperable network over spectrum purchased at auction; but Frontline wants the FCC to restrict that spectrum to public safety use. The restriction would dramatically reduce what the spectrum would fetch for the treasury at auction. Senator McCain's bill would facilitate both types of approaches.

Here is a better idea: Offer Cyren Call, Frontline and others the opportunity to bid on spectrum already restricted to public safety use. That would allow firms to build national interoperable networks without affecting how much spectrum will be available for commercial use. At the very least, if spectrum now slated for commercial auction must be used, the government should identify an equal amount of existing public safety spectrum that can be auctioned commercially once the new public safety networks are built.

Whatever path we take, we should ensure that at least two competing networks are built. This works well for wireless services such as cell phones; subscribers to one service have no trouble speaking to subscribers on another while prices are kept low.

A private-sector national network for public safety first responders is not an untested idea. In the U.K., the national network that supports police, fire and over a hundred other public safety services is owned and operated by O2, a private firm. We can do even better, using competition to spur the innovations that monopoly rarely provides.

January 26, 2007

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Implementation of section 621(a)(1) of the Cable Communications Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05–311

Dear Ms. Dortch:

Verizon submits this letter in response to a request from Chairman Martin's office. On March 6, 2006, Verizon filed an errata in this docket correcting its earlier comments concerning its negotiations with a franchising authority in Florida over PEG support. Verizon corrected its comments to state as follows:

When Verizon rejected this demand [to meet the incumbent operators cumulative payments for PEG, which would exceed $6 million a year over 15 years,] and asked for an explanation, the LFA provided a summary "needs assessment" in excess of $13 million for both PEG support and equipment for an expansion of its I-Net.

The March 6, 2006 filing further corrected one paragraph of the earlier declaration attached to Verizon's comments in order to state:

For example, one franchising authority in Florida demanded that Verizon match the incumbent cable operator's cumulative PEG payments, which would exceed $6 million over the 15-year term of Verizon's proposed franchise. When Verizon rejected this demand and inquired as to its basis, the LFA stated it was Verizon's portion of a $13 million "needs assessment" for both PEG and equipment for an expansion of its I-Net. THe LFA stated this was based on a back-of-the-envelope "needs assessment." Negotiations with this LFA are still ongoing.

Attached is a copy of the "summary 'needs assesment' " referenced by Verizon in the March 6 filing. This document was provided to Verizon by the city of Tampa during the course of franchise negotiations.

Respectfully submitted,

Dee May
Vice President, Federal Regulatory
Verizon
1300 I Street, NW
Washington, DC 20005

PEG AND I-NET COMMUNITY NEEDS OVER THE NEXT 15 YEARS NOT CURRENTLY BEING MET

PEG Capital:

Public Access—$500,000
Educational Access—$500,000
Gov't Acess—$500,000

Total—$1.5 million

I-Net Related Expansion and Equipment Costs:

Total—$4,775,000

Public and Educational Access Operational (over 15 years)

Public—$2,850,000
Educational—$4,500,000

Total—$13,625,000

OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION—PART 2

TUESDAY, JULY 24, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2123 of the Rayburn House Office Building, Hon. Edward J. Markey (chairman) presiding.

Members present: Representatives Doyle, Harman, Gonzalez, Inslee, Towns, Rush, Eshoo, Stupak, Engel, Green, Capps, Solis, Dingell, Upton, Hastert, Stearns, Deal, Shimkus, Wilson, Pickering, Fossella, Radanovich, Walden, Terry, Ferguson and Barton.

Also present: Representative Blackburn.

Staff present: Amy Levine, Tim Powderly, Mark Seifert, David Vogel, Neil Fried, and Courtney Reinhard.

OPENING STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS

Mr. MARKEY. Good morning. I want to thank everyone for being here today. I especially want to thank the five commissioners of the Federal Communications Commission for testifying this morning, especially the chairman, who has had recent eye surgery which has inhibited his ability to read. We appreciate your willingness, Mr. Chairman, to come and to answer questions today. The Commission has several important issues with which it is wrestling. For instance, the Commission has the central role to play in the overall digital television transition, and we look forward to working with the Commission on this matter.

The Commission is also contemplating whether to adopt or modify recommendations from the Federal State Joint Board on Universal Service. The recommendations, in my view, risk putting equitable comprehensive reform out of reach yet again. I hope the Commission will choose to tackle this issue forthrightly and more broadly, because the temporary measures imposed by the Joint Board are anti-competitive and ultimately anti-consumer.

I also want to mention the special access proceeding, and I want to commend the chairman for quickly putting this issue out for renewed comments. I want to commend Commissioners Copps and McDowell and Adelstein for their recognition of the need to reach

a resolution of this proceeding on a timely basis, ideally in this September.

And also looming at the Commission are several forbearance petitions. These petitions seek widespread relief of obligations that incumbent carriers have to discharge for competition policy. The effect of granting these petitions would be to usurp congressionally enacted statutes in a sweeping manner. I have great concern about the effect on competition and consumers that these petitions pose, and I trust the Commission will weigh the public interest carefully while considering whether to grant or to deny these petitions.

And finally, the Commission must soon establish rules for the upcoming auction of valuable frequencies which will become available for other uses when broadcasters relinquish them as part of the digital television transition. I want to commend Chairman Martin for proposing, in his plan for this so-called 700 MHz auction, a beachhead for consumer choice and innovation in the wireless marketplace. Creating a platform for entrepreneurial activity and investment is vital in this sector.

In context, Chairman Martin's plan is quite modest. It does not propose requiring existing wireless licensees who serve over 200 million consumers today to permit openness for wireless applications or allow consumers to switch from carrier to carrier and take their phone with them. Neither does the chairman's proposal encompass such consumer-friendly and innovation-fostering service rules for the entirety of the 700 MHz auction.

Rather, it is a proposal covering roughly one-third of the spectrum to be auctioned, and frankly, I would prefer the Commission went further in order to better unleash the disruptive nature of market forces into the wireless and applications market, but the chairman has clearly made a good start to open things up. And this new openness is desperately needed. The problem today is that for millions of consumers, the term mobile phone has become an oxymoron, like jumbo shrimp or Salt Lake City nightlife. There are no such things. It isn't really mobile because you can't take it with you when you switch carriers. Moreover, exorbitant early termination fees also make consumers feel trapped.

This scenario undermines the congressional and Commission policy. Today millions of consumers pay monthly fees on their wireless bills for number portability. What is the point of charging consumers for the ability to take their phone numbers with them if they can't take their new $500 phone with them to a new carrier? I mentioned at our last hearing that this inability fosters a Hotel California-type wireless service. You can check out any time you like, but you can never leave with your phone.

As the Commission proceeds on this matter in the coming week or so, it should be guided by the law Congress enacted for the auction process. The objectives in the law underscore that Congress knew that simply throwing more spectrum into the marketplace by selling it to the highest bidder does not, in itself, create the highest value for consumers. Moreover, absent sufficient competition, the sale of more licenses for additional spectrum does not, in itself, mean innovative new services and gadgets will necessarily arrive for all consumers in all neighborhoods or arrive in timely fashion.

The Commission has a rare opportunity to promote consumer choice, foster innovation, re-inject competition into the wireless marketplace and advance the deployment of broadband services and applications. I look forward to working with all of the commissioners towards the achievement of these objectives. Again, we thank you for coming to our hearing. The chairman's time has expired, and I will turn and recognize the ranking member, the gentleman from Michigan, Mr. Upton.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Well, thank you, my friend and chairman of the subcommittee and certainly welcome to all of the members of the FCC. This hearing today is particularly timely, and I look forward to the testimony and engaging in questions following.

The most pressing topic this morning certainly is the upcoming 700 MHz auction and in particular, what has been revealed in the press about the banded plan that is being considered by the Commissioners. The proposal now circulating sounds like an experiment. Sounds as though the Commission is asking the question is there a business model to support a so-called open access approach to wireless, but I see it as a gamble, and at stake is the success of the DTV transition, billions of dollars in taxpayer funds and public safety. This seems like far too much to put on the line, and I have always been a staunch defender of the taxpayers.

Our folks back home should not be asked to take a flier and see whether this business plan will necessarily work. Free market does work best, and successful auctions work best without encumbrances, and if Google is really right, that there is a market demand for their business model, they should be lining up to bid in a fair auction without the requirements. Google is, after all, one of the richest companies in the country, with a market cap of more than $160 billion. That is $40 billion more than Verizon, and if Google wins the auction, it is free to operate the network as it proposes.

You can try to mitigate the risk by having a very high reserve price, but now you are price fixing in addition to rigging the auction for particular business models and parties. And even with the reserve price, you are unlikely to get the $20 billion overall proceeds that the industry believes that you might otherwise raise. Every nickel below that price is a subsidy provided by the taxpayers without ever asking them whether they want to invest. Government shouldn't be in the business of subsidizing entry into a competitive marketplace.

And this industry is very competitive. Four national wireless providers, AT&T Mobile, Sprint, T-Mobile, Verizon Wireless, as well as several large regional providers such as Alltel and US Cellular. Indeed, 98 percent of consumers in 2005 lived in counties served by at least three facilities-based providers and 94 percent lived in counties served by at least 4, according to the FCC. Average minutes of use per month have grown from 140 in 1993 to 740 in 2005, while the cost per minute has dropped from 44 cents in 1993 to just 7 cents in 2005.

Indeed, the FCC itself stated in its most recent wireless competition report that competitive pressure continues to drive carriers to introduce innovative pricing plans and service offerings and to match the pricing and service innovations introduced by rival carriers. The market is also extremely innovative. The Apple iPhone is only the latest. For example, T-Mobile is already offering a Wi-Fi enabled device, and Verizon has a BlackBerry that we know works both here in this country, as well as in Europe.

The auction proposal insulates bidders from competition. I don't know how many potential bidders will decide not to participate if the auction rules are adopted, but I promise you that some will and that auction will have been distorted, and the taxpayers can be harmed. The right way to go about this is to adopt rules that are free of encumbrances; write the rules that won't have the effect of distorting the auction. Let the business folks determine what the business models are. An unencumbered auction would not preclude a company or investor from using an open access business model, but don't conduct the experiment at the expense of the American taxpayer.

Chairman Martin and Commissioners, I hope that your takeaway from today's hearing is that the plan we read about isn't quite ready for prime time. I hope that you revise the plan to ensure that these valuable frequencies aren't encumbered and avoid the distorting effects that the plan is otherwise going to have. And I appreciate being here. Mr. Chairman, I look forward to the testimony and the questions.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Pennsylvania, Mr. Doyle.

OPENING STATEMENT OF HON. MIKE DOYLE, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. DOYLE. Thank you, Mr. Chairman, and thank you for convening this hearing. And welcome to the members of the Commission. When you came before the committee in March, I questioned each of you about wireless enhanced 911. E–911 can truly save a person's life in an emergency, and I am glad that the Commission is acting to improve E–911 standards. And I am especially glad that we will be looking at critical issues, such as improving location accuracy inside buildings.

There are some concerns, however, that the draft proposal bites off more than it can chew, and I hope that you can fix those concerns by the time you finish the item. Our time is short, so I am going to apologize for only giving you a taste of the issues I am looking at these days, things like these forbearance requests, which, if granted in my district, will directly and negatively hurt the competitive industry who has been playing by the rules, and it will hurt my constituents that they serve.

Things like special access. If it were up to me, I would change the name to critical access because that is how critical those pipes are to providing competitive wireless and Internet service. Things like piecemeal attempts to reform the Universal Service Fund, when it really needs an overhaul. Things like cable box waivers that would split the baby and provide both competition and low-

cost boxes. I asked for a vote on that issue in the last hearing, and I still haven't seen one yet.

Roaming open-source software defined radios and my opposition to the XM-Sirius merger, these are all very important issues. But make no mistake, the auction of the old DTV spectrum is almost certainly one of the most critical decisions the FCC will make in decades. This auction is a test for each of you that history will long remember. Unless this upcoming auction delivers Americans a new broadband competitor, history will record it not just as a missed opportunity but as a failure.

I want to walk out of here confident that all five commissioners are doing everything possible to bring us new broadband competition for Internet services and wireless devices. America needs an open broadband platform, one that new entrepreneurs can use to get their idea out to the market. An open platform that can give regional and local carriers a national footprint. An open platform that can guarantee us robust competition, even if an incumbent makes the highest bid.

America, take note. For once we really have a good public policy proposal being advocated by a wide variety of interests, a wholesale marketplace that is open for all devices and applications. Technology policy doesn't have to be lost in partisan bickering. The people who play ball on this field aren't right or wrong just because they have a *D* or *R* next to their name. This country is thirsting for us to get together and do the right thing for the American people. If the FCC takes advantage of the opportunity it has in this auction and creates an open wholesale market, then it will have done the right thing for the American public. Give us new broadband competition, give us an open platform. Mr. Chairman, I yield back.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Nebraska, Mr. Terry.

Mr. TERRY. Thank you, Mr. Chairman. I have an excellent written statement on the necessity for comprehensive universal service reform that I would like to submit.

Mr. MARKEY. Without objection, it will be included in the record, and the gentleman yields back his time, reserves his time. The Chair recognizes the gentlelady from California, Ms. Harman.

OPENING STATEMENT OF HON. JANE HARMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. HARMAN. Thank you, Mr. Chairman, and good morning to all. I know that there are many subjects being discussed today, but no one will be surprised that I want to focus on the 700 MHz opportunity. Last week a new 50-page national intelligence estimate painted a grim picture for our national security. Al-Qaeda has regrouped, enjoys a safe haven in the Pakistani tribal areas and has the intent to deploy nuclear, chemical or biological agents against U.S. targets if it can acquire them.

Near simultaneous coordinated attacks on American soil are not a movie treatment. They are a real threat. Even if we suffer low tech attacks, such as vehicle-borne attacks or suicide attacks, they could be enormously disruptive. The question is are we ready? Six years after 9/11, I look at our first responders' emergency commu-

nications capabilities, and the answer is a resounding no. Since that day, we have done little to shore up disparate, non-interoperable systems across this country. Billions in grant dollars have not taken us far enough. Six years after 9/11, we are still not ready.

I have worked hard on the interoperability problem since the towers fell. As a result of the DTV transition, which some of us pushed for by 2006, the FCC has a historic opportunity to fix this gaping hole in our nation's security, and all of you know that. I applaud the proposal for a nationwide broadband network for first responders outlined in the draft auction order, and as you are aware, Mr. Pickering, whom I don't see yet, and I have been sending you letters, making phone calls, meeting with you and in other ways trying to encourage you to stick to its basic outlines or something perhaps even better.

This unprecedented opportunity will not come again soon, and none of us can afford to let it slip by. The public-private partnership idea is sound. It is a win-win, and without it, I think we will have a lose-lose. I think we will end up with very pricey operable communications networks all over the country, but then when we face the big one, which could be a California earthquake or these terror attacks, we will not have one nationwide interoperable network that we will need.

Chairman Martin, recently your wife gave birth to a baby boy. I know this, and I saw his cute picture on your cell phone. That is an advantage of cell phones. We finally got the images up. Your cell phone works; that is good. I congratulate you on this recent addition to your family, and I think there are some other babies among all of you. I notice Commissioner McDowell, too, has a new baby. But here is my point. These new children should inspire us to try our hardest, in the brief time we have in public service, to enact policies that will keep them safe. And unless we do the right thing about this once-in-a-lifetime opportunity on interoperable communications, I think we will have squandered that opportunity. Yield back the balance of my time.

Mr. MARKEY. The gentlelady's time has expired. The Chair recognizes the gentleman from Illinois, Mr. Shimkus.

OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. SHIMKUS. Thank you, Mr. Chairman. I will be brief. I want to associate my comments with Ms. Harman and some of the work that Anna Eshoo and I have been doing on E–911 and this interoperability. It is really key, and I appreciate her passion and her focus. I will just briefly talk about the issue of putting restrictions on spectrum that goes up for auction, and here is my concern, and I will have it in a question later on, is that based upon the testimony we had a couple weeks ago, many folks said that obviously, that makes it, for some, less likely because you are putting restrictions on the spectrum.

And my concern is if that shifts them to some of the rural, small market areas and bumps out smaller carriers that are going to compete in rural America, that is my concern. They don't bid on the big block because of restrictions. It frees them up to come into other areas, and then they can cherry pick away from some of the

really rural areas where we really want to encourage and incentivize coverage. So that is where my questions will be. You all have a lot on your plate. I appreciate the work you do, and I yield back my time, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired, and the Chair recognizes the gentleman from Illinois, Mr. Rush.

OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. I want to thank you, Mr. Chairman, for recognizing me, and I want to thank you also for calling this hearing. I want to welcome our witnesses. It is always good to have our friends from the FCC here before this committee. Mr. Chairman, in the years that I have sat on this committee and on this subcommittee, I have consistently voiced my concerns over the lack of diversity in ownership interests in the telecommunications industry. This lack of women and minority ownership is particularly disturbing to me in the wireless and broadcasting industry, given that spectrum is, indeed, a public asset that ultimately belongs to the American people.

Mr. Chairman, it is bad enough that we have so little diversity in telecom sectors, such as high-speed data services and that so few women and minorities own chunks of infrastructure that delivers those services. But given the Federal Government and the FCC, that they play such a critical role of determining how our public airwaves are distributed to private interests, the lack of women and minority participation in broadcast, wireless and satellite companies is downright shameful. It is a sign, quite frankly, that this Congress and that this commission simply do not care.

And I hope that we can reverse this trend of indifference. People of color make up almost 35 percent of the population, and this percentage is rapidly increasing. Yet, the participational rates of people of color and the ownership of the public airwaves is markedly disproportionate to the general population and has actually fallen. Nationally, minorities own no more than 3 or 4 percent of the radio and television broadcast industry, and minority ownership of wireless services is nearly zero. How is this possible? How can this be acceptable to this commission or to this Congress?

Under section 309(j) of the Telecommunications Act, the FCC is required to promulgate rules for, and I quote, "disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women." As we approach the upcoming 700 MHz auction, I, for one, want to hear how the FCC is going to do a better job of promoting minority and women-owned businesses and their ownership interest in the public spectrum.

Mr. Chairman, I am tired of seeing the same faces consistently playing the big roles, getting all the big goodies in these auctions and reaping, thereby, billions of dollars. It is time that other businesses from disadvantaged backgrounds be able to sit at the table and carve up the pie and not be left with mere crumbs. I thank you, Mr. Chairman, and I yield back the balance of my time.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the ranking member of the full committee, Mr. Barton.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. Thank you, Mr. Chairman. I have been flagged on one of my earmarks, so I am going to have to go to the floor sometime pretty early in the hearing to try to de-flag the flag, and so it is not an insult to our distinguished commission, but I may have to leave briefly. But I am glad we have all five of our Commissioners here. I know it is tough to come over here to the House when you could be over in the Senate, you know, a little more media coverage over there, little fancier cufflinks, but we are the people's body, and we have every right to have your eminences before us, and we appreciate your willingness to come, and we appreciate Chairman Markey's willingness to hold the hearing.

I have a couple of issues that I would like to raise and I hope to be here to ask some questions. The first one is the Universal Service Fund. I think it is broken, and I don't think it can be fixed. I would repeal it if I had a majority of the votes; I don't. But I do hope that we can reform it. Last year, this fund assessed about $7 billion on users of our telephone system and I believe sent about $6 billion of those dollars back out to various subsidies. We have a very perverse system in which, in some cases, the more cell phones you have, the more subsidies you get, and the less efficient the market becomes.

I know that the Joint Board has sent in a reform suggestion that you cap the number of funds that can be given to a particular program or a particular carrier. I wish you guys would really bite the bullet and just go ahead and really restructure the program. I have talked to most of you on an individual basis, and you all nod your heads and agree that something needs to be done. So maybe this is the year that that can happen.

The second issue I want to raise is the upcoming 700 MHz auction. I am very disappointed that apparently a majority of the Commission, including our chairman, wants to put conditions on this auction. I know that there is a diversity of political affiliation on the Commission, and that is as it should be. People like me, that have an *R* by our names, we generally, and I, specifically, support free markets. I think the less fetters you have in terms of conditions on an auction and the more open the process, the better it is going to be. I think, also, you are going to get more money if you do it that way.

I am very disappointed that Chairman Martin has come up with this plan. It is not quite as bad as the Frontline plan, but I don't think it is as good as an absolute, no-condition auction. Now, I heard what my good friend from Chicago Mr. Rush said, and I think he has got some points, and maybe we ought to, at some point in time, look at some minority set-asides and things like that. Over time, a market-based principle will set the general conditions on what you have to have in terms of the ability to compete and in terms of financing the bid that you come up with. Then let whoever has the most innovative way to use the spectrum do it. If that doesn't work, you can always take it back, and over time, that is going to give us the best telecommunications system that is possible.

I am told that the votes are there for the Martin plan. Maybe this hearing today may change a couple of minds, who knows? So anyway, Mr. Chairman, those are my general concerns. I do appreciate you holding this hearing, and I think it is very important we have the Commission before this subcommittee. We spend a lot of time arguing over healthcare policy and energy policy and environmental policy, but right now, telecommunications policy is driving the economy of our country, in terms of innovation and productivity, really is telecommunications policy. So this is big stuff. With that, Mr. Chairman, I appreciate your willingness to hold the hearing, and I yield back.

Mr. MARKEY. Thank you, Mr. Chairman. Thank you, Mr. Barton. The Chair recognizes the gentleman from Michigan, Mr. Stupak.

OPENING STATEMENT OF HON. BART STUPAK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. STUPAK. Thank you, Mr. Chairman, and thank you for holding this hearing. I would like to welcome our distinguished panel of witnesses today. Having all five commissioners before our committee twice before the August recess must be a record. This is a very timely hearing as the Commission is expected to finalize the rules for the 700 MHz auction by the end of the month. These rules will have a great impact on the future of public safety communications and broadband service in rural America, two areas I care deeply about.

Press reports indicate the Commission may require the winner of one block of spectrum to build its network to the specifications of public safety in an effort to construct a nationwide public safety network. I support this proposal and commend the chairman for taking this bold step. I also urge the Commission to finalize the band plan for public safety spectrum in a way that does not penalize first responders by putting them on a different frequency than their Canadian and Mexican counterparts.

Turning to the issue of rural broadband, the 700 MHz auction is often talked about being the savior of rural broadband deployment. This will only be the case if the rules are done right. I wish to urge the commissioners to give small and regional carriers the chance to compete in both the lower and upper bands of the 700 MHz auction. These carriers are located in rural America, they know rural America and they want to serve rural America. They should be allowed, to the maximum extent possible, an opportunity to compete with the national carriers.

Finally, I supported the strong requirements proposed by the chairman this spring. I am hopeful the Commission will take a measured approach when weighing industry's concerns with the need to make sure wireless broadband is actually deployed in rural America. I was less encouraged by the Joint Board's recent proposal to cap USF wireless support. As I said at a subcommittee hearing earlier this month, temporary policies at the FCC tend to become permanent.

The cap would permanently freeze wireless service in areas of the country where service is woefully lacking. The chairman has indicated he wants to act quickly on this issue, but I encourage the Commission to act comprehensively on wireless support rather

than choose the easy option of simply freezing support. I look forward to delving into these and other issues during the questions, and I yield back the balance of my time, and thank you again to the Commission for being here.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from New Jersey, Mr. Ferguson.

OPENING STATEMENT OF HON. MIKE FERGUSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. FERGUSON. Thank you, Mr. Chairman. Thank you and Mr. Upton for holding this hearing. I want to extend a warm welcome to Chairman Martin and the commissioners. Thank you very much for being here, and thanks for your important work at the Commission. Quite a bit has happened in the telecommunications arena in the past 4 months, both in the private sector, and the public sector and I look forward to hearing your views on all of these different issues and topics.

One issue that has received a lot of attention, lately, is the pending 700 MHz auction. In about a half a year's time, the FCC is set to begin auctioning 60 MHz of spectrum. It is extremely important, I believe, that this auction proceeds uninhibited by conditions or by regulation. From the billion dollars allocated to help our first responders to buy interoperable equipment to the $1.5 billion for converter boxes, we have made a commitment to the American taxpayers to maximize the revenue that the auction will generate.

While I am on the subject of adverse effects of regulation, I want to briefly address a couple of other issues that, in turn, have significant impact on my constituents in New Jersey. The first relates specifically to the DTV transition, something all of us want to make sure that we get right. Chairman Martin decided recently to propose dual carriage obligations on cable operators, despite the fact that the Commission twice rejected dual must carry.

Many thought that this issue was behind us, yet somehow, in the latest DTV proposal, this issue has been revived. Last session the leadership of this committee negotiated an agreement with the cable industry for limited dual carriage during the DTV transition. Putting up what, frankly, I would consider, possibly, an unconstitutional roadblock, at this point, is hardly the way to facilitate a seamless DTV transition.

The second issue concerns Chairman Martin's integrated set-top box waiver decision. Some waivers were granted, others were not, creating a marketplace where some consumers will be forced to pay more than others for the same service. I am particularly troubled by the denial of Comcast's request to offer a low-cost set-top box that could actually encourage consumers to switch to digital television without using a Government subsidy.

In my district, Verizon offers video, and they received a waiver, which I support. Cablevision offers video; they received a waiver for different reasons, and I support that, as well. But Comcast, which counts a huge number of my constituents also as customers, didn't receive a waiver. So I have constituents paying more for a set-top box from Comcast that has no different functionality than the box Verizon or Cablevision provides. It is pretty tough for me to try and

explain this to my constituents or explain some rationale for why there is this discrepancy.

Whether we are talking about the 700 MHz auction or the DTV transition or fostering a competitive telecommunications marketplace, selective regulation and conditional policy making are not the answer. I strongly urge the Commission to avoid this route as you move forward. Again, I welcome you all here today. I look forward to hearing your views. I certainly appreciate the important work that you do on behalf of our country, and I thank you, Mr. Chairman, and I yield back.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from New York, Mr. Towns.

OPENING STATEMENT OF HON. EDOLPHUS TOWNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. TOWNS. Thank you very much, Mr. Chairman. Let me thank you for holding this hearing and also Ranking Member Upton and to thank the five commissioners for coming again. Of course, we look forward to the testimony. I also would like to thank each of the witnesses for their long record of public service. Each of you have shown great dedication, and I applaud and congratulate you for that. I hope your testimony will assist us in understanding the future of the industry and how our constituents may be affected by upcoming events and how our constituents may be affected by these things. And we must keep the constituency in mind as we move forward.

I am pleased with the exceptional growth and innovation taking place in this sector today, but we must look at ways to improve diversity. The issue can no longer be ignored because it is one of fairness and we must be about fairness at all times. As we move forward, I will work with my colleagues to make sure the FCC is hearing all sides of the issues and relying on sound technological study to make its decisions.

The primary beneficiary of its work should be the American consumer. I will work with my colleagues to make sure they have the choices they want. I will also work with this committee to make sure the industry has the certainty it needs to take risks and make the investments to create jobs and revenue. I look forward to hearing your thoughts on these and other issues, and of course, Mr. Chairman, I think that we need to continue the dialog because we need to know a little more about ways and methods how we can bring other people in, and I think that we are not focusing on that enough and that the same folks are just sitting at the table over and over again, so we need to make certain that some new people are brought in, and the only way we can do it is through this process. So thank you very much, and on that note, I yield back.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Florida, Mr. Stearns.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORDIA

Mr. STEARNS. Good morning, and thank you, Mr. Chairman. Let me compliment you on the number of hearings you are having. We

thank this particular group of individuals or witnesses for their forbearance for waiting through our opening statements. You know, we see with the iPhone that sort of the convergence of all the different wireless, cable, phone, everything is coming together, and so the auction of the 700 MHz is going to also work in that area. We saw incredible innovation of deployment of next generation mobile broadband, voice, video and data last year, with the advanced wireless services auction. We saw both new and existing licensees spend almost $14 billion, creating three more nationwide licensees which will compete against the four existing nationwide carriers, not to mention additional regional carriers. And of course, we have the auction now of the 700 MHz.

I think a lot of folks on both sides have talked about the imposition of the open access rules. I think that is one of the key areas that we would like to hear what your rationale is for it. I think we have been a little critical on this side. We wrote a letter to you, Mr. Chairman; I think 12 of us signed it recently asking for a little bit more information on the open access rules. We think, obviously, they would affect the auction for one business model over another and depress the auction revenues that are earmarked for important things such as deficit reduction, the public safety operability grants, and so I look forward to hearing from not just the chairman, but all of you, how you feel about this.

One broad theme which I think members of this committee are interested in is the rules and procedures the Commission just uses in general, and particularly, I am interested to see why the FCC has refused to implement some procedures or standards for the proper disposition of forbearance petitions. As co-author of this provision in the 1996 telecom act, I am well aware of Congress's intent in this matter to deregulate based on proper analysis of the competitive market, so that is another area that I hope to hear some of your comments on.

I believe, given the increasing number of forbearance petitions being filed with the FCC, there needs to be some formal process established to govern the implementation of the forbearance statute. The FCC has the authority to do so, it just doesn't appear to want to do it. Perhaps it doesn't have the will, it is not the consensus, so it is just an area I would like to talk about. So those are the areas, Mr. Chairman, that I have in my opening statement. Thank you.

Mr. MARKEY. Gentleman's time has expired. The Chair recognizes the gentlelady from Silicon Valley, Ms. Eshoo.

OPENING STATEMENT OF HON. ANNA G. ESHOO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. ESHOO. Thank you, Mr. Chairman, for holding the hearing. Good morning, Mr. Chairman, and the commissioners. It is good to have the FCC here again. I want to congratulate you, Mr. Chairman, on your new child, and I hope that everything has settled in your household. I know that there was obviously a lot of joy with the new child, but there were a series of things that kind of rocked your household, so I hope all is well now.

I want to begin by acknowledging the Commission's efforts to ensure that consumers have a choice. I think it is very important across the board but certainly in set-top boxes that they use to receive cable service. I think I raised this the last time the commissioners were here. While I think it has taken much, much longer than I would have preferred to implement these provisions of the 1996 telecom act, competitive alternatives are now appearing in the marketplace, and I think that that is very good.

Now, if the press accounts are accurate, the Commission is also considering a plan for the 700 MHz auction next year that includes open access service rules for a portion of the spectrum. This represents what, about a third, I think, of the spectrum, so this is very, very important. Now, it is a curiosity to me to hear how some members describe what is being considered. I think where some have really been restrictive about access, now opening it up is being called restrictive, so there is a play on words here. But I think I would like to go with the dictionary's definition of open and encourage the Commission to look at it that way, as well. I think that these are the kinds of requirements or rules of the road for the future, that certainly the subcommittee chairman and some other members have really encouraged and advocated for some time.

There are, I think, many other aspects of the Commission's work that really give me pause, though. In particular, I am concerned about the Commission's recent implementation of section 10 of the 1996 act, commonly known as forbearance, and I think there has been at least one member, maybe others, that have raised this. Under section 10, if the FCC does not deny a petition for forbearance from enforcement of any portion of the act within 1 year of the date it is filed, the petition is deemed granted.

The forbearance process has recently been used by large telephone companies to terminate the enforcement of key provisions in the act that were designed to spur competition and promote innovation. I think that this has really kind of twisted into a pretzel, what the Congress's intent was at the time. And I really don't see how the full commission can defend this. This is an area that really needs work, and by the way, I don't think these are partisan issues. I think that we really have to clean this up.

Finally, I want to call my colleagues' attention to—if you haven't read it—we will distribute this, an op-ed last month that Commissioner Copps wrote about public broadcast licenses, so I would like to place that into the record. I would recommend it to my colleagues' attention, and I think that there are obligations that come with the license renewal. I know I am past my time. I am glad that you are here and look forward to asking you questions. Thank you, Mr. Chairman, for your forbearance.

Mr. MARKEY. The gentlelady's time has expired. The gentleman from Georgia, Mr. Deal, is recognized.

OPENING STATEMENT OF HON. NATHAN DEAL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. DEAL. Thank you, Mr. Chairman. I would like to welcome the commissioners back again and to thank you at the outset for responding to my post-hearing questions last time. As you may re-

call, one of the questions that I was concerned about was the most efficient and timely use of the white space spectrum after the DTV transition. In your responses, there was almost unanimous consent that an unlicensed approach would be a most efficient and beneficial use of the spectrum for the American people. As you may know, Representative Inslee and I have introduced legislation which would allow for the operation of unlicensed devices in television white space.

Commissioner McDowell, in your opening statement, you mentioned you expected the Commission's Office of Engineering and Technology to issue a report on its testing of the white space devices later this month. I believe Chairman Martin has set the deadline of July 31. I am eager to hear if you plan to meet that deadline and if the report will include a full analysis of the feasibility of the devices.

As I have said in the past, I believe it is important for the Commission to conclude its testing in a timely fashion so that we can move to facilitate the use of unlicensed white spaces, as they will lead to increased broadband access for millions of Americans and enable a wide range of innovative wireless devices and services. It is my belief that a deregulated open white space spectrum will allow for greater innovation and the development of new devices and tools which will enable more economical broadband deployment in rural and underserved areas and ensure the efficient utilization of unused spectrum.

Before concluding, I would like to mention something that Ms. Eshoo also mentioned and that is the number of forbearance petitions which are currently pending at the Commission. I would like to encourage you to rule on these petitions using the normal full administrative processes rather than allow these petitions to go through without proper consideration. As you know, many companies with varying interests, including a number located in my home State of Georgia, are concerned with how these petitions could affect them and their consumers. I would encourage you to give full consideration to all of the parties as you consider these forbearance petitions. Mr. Chairman, I thank you, and I thank all the commissioners for being here today, and I yield back my time.

Mr. MARKEY. The gentleman's time has expired. The gentlelady from California, Ms. Solis, is recognized.

OPENING STATEMENT OF HON. HILDA L. SOLIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. SOLIS. Thank you, Mr. Chairman, and I appreciate the hearing that you are having today and I am especially pleased to see our FCC commissioners. And I am interested in hearing from the chairman and our commissioners about a number of topics, especially the ongoing consumer education campaign in advance of the digital television transition. Households with over-the-air television sets and no cable or satellite service, as you know, will be the most impacted by the DTV transition. These households, in my opinion, are disproportionately low-income and Spanish speaking. And I hope that each of you will address outreach efforts to households with limited Internet access and language barriers and outline cre-

ative solutions to ensure that consumers are not left behind in the digital transition.

I am also concerned about the recent decisionmaking process at the FCC. The automatic approval of forbearance petitions without action by the FCC runs contrary to congressional intent. And in addition, if the FCC does not act on such a petition and it is deemed granted, any benefits to consumers could be overshadowed by the questionable process. Another matter pending at the FCC, in my opinion, is the sale of the Tribune Company, which owns a number of media outlets, including the Los Angeles Times in my area. The Commission has an important duty in reviewing the sale to ensure that local interests and the public interest are well served. And I have concerns about the current proposed structure of the Tribune sale because it places a heavy debt burden on employee stock ownership plans without giving those employees a true voice on that board of directors or input on the governance of the company.

Finally, I look forward to learning more about the forthcoming rules of the 700 MHz auction. We all know that this auction could be the turning point in our country to close the digital divide and ensure broadband Internet access for all. But this goal can't be realized if the auction rules allow for continued consolidation of spectrum licenses with a few large companies. I was pleased at some of the chairman's recent proposals to allow for open access on some of that spectrum.

And I urge the Commission to go forward and adopt rules that would promote diversity amongst spectrum license holders, promote innovation and new technology and increase public safety. I hope that the auction rules regarding designated entities will strike a good balance between small business. Thank you again, and I am pleased that our witnesses are here today. I yield back the balance of my time.

Mr. MARKEY. The gentlelady's time has expired. The gentlewoman from New Mexico, Mrs. Wilson, is recognized.

Mrs. WILSON. Thank you, Mr. Chairman. I will waive my opening statement.

Mr. MARKEY. The gentleman from Mississippi, Mr. Pickering, is recognized.

OPENING STATEMENT OF HON. CHARLES W. "CHIP" PICKERING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSISSIPPI

Mr. PICKERING. Mr. Chairman and to the panel, I look forward to the hearing today. Let me first go through the issues that I would like to address. First, the 700 plan and then talk about specialized forbearance. But on the 700 plan, as we try to measure whether the 700 plan addresses the needs of the country, there are several criteria that I use. One, does it increase the security of our country? For the individual, does it increase individual choice, freedom and property rights? For the market, does it increase competition, innovation, investment? And for the country, from rural areas to urban areas, does it build the infrastructure that we need for our economy to grow and for commerce to flourish for Small Town, Mississippi or New York City?

And I think on each of those criteria, the 700 plan increases, enhances, improves and makes progress on all of those serious, very important objectives for our Nation and criteria as we judge the policy. That is why I want to commend the chairman for putting together something that does build out a public safety network using a private sector partner. For giving individuals the property rights and the freedom to control their device and to open up what happens with very important devices from the BlackBerry to other things that can be greatly beneficial to the individual.

As we look at free markets, and this is as a conservative, if you look at the most innovative, where capital flows, where innovation and investment is greatest, it is traditionally in open systems. The interstate system is probably the greatest success story of creating the level of economic growth over the last generation. The Internet, natural gas, energy systems that are open, produce the investment and the competition and the choice for free market capitalism to work.

And so for those on my side of the aisle, when somebody says open it, do not think that this somehow contradicts our core beliefs, principles and philosophy. It enhances our core beliefs, philosophy and principles. And what the chairman is doing today is strengthening markets, enhancing capital, increasing innovation and investment. And so I want to commend him, philosophically and in principle and for the boldness of what he is trying to accomplish and achieve.

And then I would also like to say, as someone from a small State, the requirements to actually build the infrastructure so that we can have broadband in Mississippi and broadband anywhere in the country, just like the interstate system, it will enhance commerce and growth from all parts of the country and all sectors and all segments. This is a balanced, good plan. I look forward to working through the rest of the week with my colleagues and with the Commission in making sure that this very important policy decision, probably the most important wireless decision of the next decade, is completed in a good way.

I do have other issues. The special access decisions should be done in a timely way, a proper analysis is done and I look forward to the time that I will have for questions on forbearance and Universal Service and thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. The gentleman from Texas, Mr. Gonzalez, is recognized.

OPENING STATEMENT OF HON. CHARLES A. GONZALEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GONZALEZ. Thank you very much, Mr. Chairman. Welcome, the chairman and members of the FCC. I am more concerned, I guess, today, and I hope to remain through the whole hearing, regarding the auction, and I guess the question that I would have and I think is going to be addressed in your testimony is what predominates. One is are you going to try to get us as much money as possible, and the reason for that is Congress has already spent that money, and it would be really nice if you could give us more than we spent, or is it really going to be about giving consumers more device choices and spurring innovation, or could it be a

scheme or a plan to assure the greatest investment in build out, maintenance and improvement of the network. I just want to hear your thoughts on those.

The other thing is putting things in context. My fear is this thing about open access means so much to so many different people, and I am afraid it is being misrepresented because I am not real sure, and I am hoping that you address some of the elements that are out there right now in circulation and that is we understand, from the network point, what open access may mean or may not mean. What I am thinking, in terms of manufacturers and software application providers, how they might impact choice and innovation. And what I mean by that is are you going to be able to dictate to Apple and iPhone a different system than iTunes when it comes to music now that we have a convergence and we know what the iPhone is?

There is a story today in the Post about Nokia buying Twango, acquiring Twango, a closely held media sharing Web site and it says Nokia will divide its cell phone business into three units: mobile devices, services and software, and a markets division. Twango service is free, but Nokia plans to add elements for which customers will have to pay, so now I am going to have a device maker that has some sort of other consideration, and I am sure one is going to be tied to the other.

Will it restrict the ability of the manufacturer or an application provider or software provider to enter exclusive contracts, because surely, that would have some sort of a chilling effect on choice and innovation. To all MySpace subscribers, would it address the limits that are imposed on them on software tools that they could use in their pages? How about Bear Stearns or a private enterprise that is not going to sync their existing systems so that people can use their iPhones?

All of that, people really believe that this open access is going to address all of that. Open access will also allow me to use Google's Checkout as opposed to eBay's PayPal. Will it make sure that Microsoft's operating system Vista doesn't mitigate against a search engine as provided by Google? There are truly people out there that believe you are going to address all that with this open access model, so I would like for you all to actually maybe go beyond networks into the other aspects of the Internet. Thank you very much, and I yield back.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Illinois, Mr. Hastert.

OPENING STATEMENT OF HON. J. DENNIS HASTERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. HASTERT. Thank the chairman. I would certainly like to welcome the FCC commissioners here today and welcome the timeliness of today's hearing, Mr. Chairman. We all know that within the next couple of weeks the Federal Communications Commission will adopt rules that will affect prime real estate in the communications sector, ultimately changing the way spectrum is used here in the United States. I was here in 1993. I was on this panel in 1993. I know what the legislative intent of the 1993 act said. I

also know things have changed a lot since 1993. You have to look at all those other issues.

I guess I won't be as flowery as my good colleague from Mississippi was, but in 1993, when Congress passed the Omnibus Budget Reconciliation, Congress moved spectrum allocation to an auction-based method to ensure that spectrum is efficiently allocated to those who valued it most. As a result, the auction-based method generated billions of dollars in revenue for the Federal Government, then produced numerous economic benefits for people in this country. These benefits are present in the competitive wireless market today, innovative service offerings.

Now the FCC has another opportunity to do what Congress intended with the 60 MHz of spectrum cleared by the digital television transition. Without onerous service conditions, the auction can also raise billions of dollars for taxpayers and enable carriers to provide the next generation of wireless broadband services.

Instead, I am disappointed to hear that Chairman Martin has been circulating a plan that will impose regulations, such as open access, to more than half of the 60 total MHz up for auction. Imposing mandates on 32 MHz that will harm consumers, provide less for all and crowd out the small and rural carriers from bidding in the auction. Rather than help the goals Mr. Martin claims to achieve, he structures the most important auction of the century to tilt in favor of a business model that has not committed to bidding unless they receive all of their conditions.

The FCC is charged to manage and secure our Nation's most secure resource, and I urge the Commission to review its rules and policies and open the auction to a market that will utilize the spectrum most efficiently. This is the only way to ensure that the auction proceeds on schedule. I look forward to hearing the answers from the Commission today. Mr. Chairman, I thank you and yield back my time.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Texas, Mr. Green.

OPENING STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GREEN. Thank you, Mr. Chairman, and I want to welcome our FCC commissioners to the first hearing where we have had our commissioners for the new Congress and thank the chairman for holding the hearing. There are a number of important issues on the horizon that the FCC will be acting on and involved with, and it is important that our subcommittee provide that oversight. The DTV transition is fast approaching. I look forward to hearing what the Commission has been doing to ensure that the transition goes smoothly. This transition has the potential to impact tens of millions of people. We need to make sure Americans are aware it is coming.

It seems that there has not been a widespread public awareness campaign. With the transition less than 2 years away, we need to ensure that these pockets of the population who heavily rely on over-the-air broadcast, the elderly, the low-income and non-English speaking households, know the transition is coming and how to apply for the converter box coupon. The DTV transition is also

going to open up spectrum, part of which will be designated to the public safety communications network. I look forward to hearing more about the 700 MHz plan for public safety communications and the Commission's plans for promoting a public-private partnership to build a nationwide network.

Last week the National Telecommunications and Information Administration announced nearly $1 billion in public safety interoperable communications grants, and I am pleased that NTIA awarded these grants in a manner many of my colleagues, as well as mayors from some our Nation's largest cities, supported by giving priority to urban area security initiative tier 1 cities. The funding for these grants, which will come from the sale of the 700 MHz, will provide significant support for tier 1 cities to improve their communication systems.

One of the most widely covered issues lately has been the part of the proposal that would impose open access on the largest blocks in the upper section of the 700 MHz spectrum to be auctioned. Spectrum is a limited commodity and 700 spectrum even more so because of its unique characteristics. Placing conditions on any block in the upcoming auction would limit the number of bidders and benefits a limited number of companies. The current plan, however, of an open access block has not appeared to please any possible bidders.

I understand the intention of the plan is to promote new competition in wireless broadband, and I am concerned about the intents by companies and groups to pressure the FCC to go even further than it already has to condition a block or blocks of spectrum that will limit what license winners can do with the spectrum and limit the number of bids on that block. Open access and wholesale are terms that should be included in a business model and not imposed on companies through a Government auction.

Two of the last issues I would like to mention that I contacted the FCC about in the last year are cable set-top box waivers and the XM-Sirius merger. That is why I wrote to each of you expressing my concern that if the FCC did not grant certain waivers of the rule, costs for the set-top boxes would rise, resulting in fewer customers having access to digital programming and slowing the transition to all digital platforms. Since then, the Media Bureau has rejected numerous waiver requests, and I am concerned this will make it harder and more intrinsic for cable companies to bring digital services to their customers.

Just 2 years ago, the FCC recognized how important availability of low-cost, limited function set-top boxes would be to advancing the digital transition. With cable companies working with electronics manufacturers to develop and download security software, Mr. Chairman, I would also mention that 72 of my colleagues joined me in signing a letter to the FCC concerning the XM-Sirius merger, and I appreciate the Commission discussing that. Thank you.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Oregon, Mr. Walden.

Mr. WALDEN. Thank you, Mr. Chairman. I just want to welcome the commissioners. I will waive my opening statement and reserve the extra time for questions. Thank you.

Mr. MARKEY. The Chair recognizes the gentlelady from California, Mrs. Capps.

OPENING STATEMENT OF HON. LOIS CAPPS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. CAPPS. Here we are again, Mr. Chairman, as you promised. Thank you for holding this second subcommittee FCC oversight hearing, and welcome back to all five of the commissioners. I believe the FCC is a more effective agency when this subcommittee aggressively exercises its oversight responsibility, and I hope that everyone agrees with that. The last hearing I asked Chairman Martin and Commissioner Copps about the FCC's lack of important data on broadband deployment and the inadequacy of the speed the FCC uses for broadband.

While this subcommittee considers a legislative solution to these problems, I would like to urge the Commission to collect more useful data on broadband penetration by looking deeper than the standard of one subscriber per ZIP Code and updating the definition of broadband to a sensible speed. There is some urgency, I believe, because unfortunately, our Nation continues to fall in international comparisons of broadband deployment. I hope the FCC will take the opportunity afforded by the upcoming 700 MHz auction, as my colleagues have mentioned, as well, to increase the competition in the broadband market.

I want to commend Chairman Martin for proposing the inclusion of wireless Carterfone rules in a portion of spectrum to be auctioned. At our last hearing, Professor Tim Wu of Columbia Law School told the subcommittee that the United States is the leading innovator in most areas of developing technology with the major exception being the wireless base. It seems to me that applying Carterfone to a portion of the spectrum might help us to rectify that situation.

I also want the FCC to continue to consider other conditions with the auction including, perhaps, wholesaling requirements. I also would urge the Commission to require anonymous bidding so as to reduce the chance that companies can collude to keep out competitors. I know there are other plans to increase broadband availability pending at the Commission and call upon you to fully consider that.

Two other brief matters to discuss briefly. They are not brief. I believe the Commission should work for greater transparency in the special access market. Competitive local exchange carriers, wireless providers and other companies pay special access fees to access incumbent networks. The FCC should ensure that these fees are fair and not set or collected in a manner that reduces competition. Finally, as a public health nurse, I want to commend the work of the FCC's task force on obesity. I am particularly pleased that the 11 companies who have entered into a voluntary initiative to restrict their food advertising to children have agreed not to mix healthy and unhealthy messages. That was an issue I raised in an earlier subcommittee hearing on images kids see on the screen. We actually had one that mixed.

Instead, the companies will not advertise unhealthy food to children under 12, period. We must make sure, however, that the food

companies' definition of unhealthy food is sensible and I also want to ask the commissioners in the task force to work to bring media companies to this table, as well. So I thank the commissioners again and to our chairman. I yield back.

Mr. MARKEY. The gentlewoman's time has expired. The Chair recognizes the gentleman from Michigan, Mr. Dingell.

OPENING STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. DINGELL. Mr. Chairman, thank you. I commend you for this hearing, and I am delighted to welcome the five members of the Federal Communications Commission to the committee. I am particularly pleased, Chairman Martin, that you are here this morning. I am aware that you recently underwent emergency eye surgery and that you have had some real honest problems in terms of reviewing much of the material that you would normally do in advance of this hearing. I hope my colleagues will keep this in mind when they ask questions of the chairman. I certainly will, and Mr. Chairman, I wish you a speedy recovery.

I also want to thank the members of the Commission for being here. Thank you, ladies and gentlemen. And I would like to thank you all for the recent full consumer actions that the FCC has taken since our last oversight hearing. Ensuring a smooth DTV transition is one of the most important tasks facing the Commission. While much work remains to be done, I am particularly pleased that the FCC brought enforcement actions against TV manufacturers for importing non-DTV compliant sets and against retailers for failing to properly label analog sets.

The Commission has also re-chartered its consumer advisory committees and increased their focus on the DTV transition. I commend you, ladies and gentlemen, for that. The most immediate issue at the Commission, in my view, is the 700 MHz auction. I understand that the chairman has circulated a draft order that includes some variation of the Carterfone or device portability rules for one block of spectrum. If done correctly, these rules could provide great consumer benefits. Given the proposal's limited scope, this would be an opportunity to open one small slice of the public's airwaves to greater consumer choice and to much greater technological innovation. The Commission must, however, be careful, as I am sure they know, to ensure that this proposal does not result in increased costs to consumers.

I am also interested to know how the Commission will address the needs of public safety communications. The answer is through the auction. Improving communications interoperability must be a priority as the Commission completes the rules. This is a crucial issue for the public safety community and indeed, for the country. I am concerned about the Commission's process relating to waiver requests on integrated cable set-top boxes. The statute requires the Commission to grant waiver requests within 90 days of when the application is filed. Many requests were pending for much longer than that. The statute allows the Commission to grant a waiver, when necessary, to assist the introduction of new or improved services.

In some cases, however, the Commission determined that even though a waiver request did not meet this statutory requirement, the Commission could grant waivers pursuant to other means. I find this a matter of great concern. I am concerned that this procedural maneuvering has not been fair, open and transparent to all policies involved and to all parties involved. It certainly does not give me comfort in how that has been done.

Finally, 1 year ago today, Senators Inouye and Dorgan, Chairman Markey and I sent a letter to the chairman concerning forbearance petitions. I was concerned then, as I am now, that it is possible that a forbearance petition could be deemed granted when a minority of the commissioners support it. We ask the Commission to take steps to see that such procedural failure does not occur again. I hope the Commission provides details today on how it will avoid the problem of action through inaction in the future.

Mr. Chairman, I thank you and your associates and colleagues at the Commission for being here today, and I look forward to hearing your testimony. Mr. Chairman, I thank you for your courtesy. I yield back the balance of my time.

Mr. MARKEY. The gentleman's time is yielded back, and we now recognize the gentleman from Washington State, Mr. Inslee.

Mr. INSLEE. I will reserve my time, Mr. Chairman. Thank you.

Mr. MARKEY. The gentleman's time has been reserved, and by unanimous consent, the gentlelady from Tennessee, although she is not a member of this subcommittee, can be recognized to make an opening statement. Without objection, you are so recognized. Welcome.

OPENING STATEMENT OF HON. MARSHA BLACKBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mrs. BLACKBURN. Thank you, Mr. Chairman, and again, I appreciate your consideration for allowing me to participate by unanimous consent in the hearing today, and I am looking forward to the testimony from our commissioners. I think the time is certainly ripe for rigorous oversight of the FCC, and you are currently presiding over a host of issues. I think it is a staggering docket of critical issues that will shape the long-term future of American communications law, including wireless spectrum, the auction, wide ranging broadband expansion proposals, digital TV transition and so many other issues. It is therefore critical for Congress to remain actively engaged in the Commission's regulatory process and today's committee hearing is an excellent opportunity to follow up on several outstanding issues that were raised during this subcommittee's work on March 14 in that oversight hearing.

Our colleagues have an active interest in several issues that will arise as we move forward, but I think none is more pressing than the 700 MHz auction that is upcoming. Mr. Chairman, as you know, it is well known to all our colleagues that the Commission will soon determine the rules that will govern this auction. The auction was authorized by Congress during the Deficit Reduction Act of 2005, which I believe is an important factor that many times gets glossed over as we discuss this issue and have a debate, and

it is important that the Commission establish a fiscally responsible free market oriented process that will govern the auction.

Anything else may threaten the goals that Congress passed and the president approved in 2005, which is to save the taxpayer money and to reduce the deficit. The Commission therefore has an opportunity to accomplish this goal while at the same time spurring innovation in the wireless market. Neither of these goals will be achieved, however, if the Commission imposes burdensome and unnecessary open access regulations or licenses on our licensees that might jeopardize the potential for revenue generation and corporate interest in the auction.

The auction process enacted by Congress and implemented by the Commission has developed a track record of success in the wireless industry for over a decade, and as a result, wireless licenses were granted to entities that provide billions of dollars in proceeds for the U.S. Treasury and made efficient use of spectrum as determined by the market during this time. The auctions were successful due to an FCC-governed process that did not saddle licensees with burdensome regulation.

Mr. Chairman, let us keep our eye on the ball and achieve the goals that Congress established in the Deficit Reduction Act and ensure that the 700 MHz auction will drive the next wave of innovation in the wireless market and make it a success. I yield back.

Mr. MARKEY. The gentlelady's time has expired. While the gentlelady was speaking, the New York delegation arrived at our hearing, and we will begin by recognizing the gentleman from New York, Mr. Engel.

OPENING STATEMENT OF HON. ELIOT L. ENGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. ENGEL. Thank you very much, Mr. Chairman, for holding this important hearing. I would like to thank the commissioners for their time today and am pleased to welcome them back to the committee. I especially thank Commissioner Copps, who I met at the Harry Potter screening not long ago. I would like to start by thanking Chairman Martin and the commissioners for granting experimental authority to the Metropolitan Television Alliance to operate a digital television system on select channels in New York City.

Several of my colleagues on the committee, including the distinguished chairman and ranking member of the subcommittee and my New York colleagues on the committee, Congressmen Towns and Fossella, joined me in sending a letter to the FCC requesting they expedite and grant a temporary authorization to MTVA, and shortly after the application was approved. I believe it is an important step to ensure that there are adequate digital signals from the Empire State Building. Obviously, New York has had a great problem with this since September 11. Needless to say, we do not want to leave the largest media market in the dark in February 2009, and I thank the Commission for their efforts to help New York.

Today we will hear many of our colleagues bring up an array of important issues that is within the FCC's jurisdiction. One issue that is of particular importance to me is the state of the DTV transition. The FCC has been tasked with the responsibility of the suc-

cess of this transition. While I am pleased to learn of some of the recent actions taken by the Commission to educate the consumer of this historic transition, I believe more needs to be done. I always mention this. That is why I introduced the National Digital Television Consumer Education Act. I am pleased to report that the Association of Public Television Stations have endorsed this important bill. Mr. Chairman, I ask unanimous consent to submit their letter of support for the record.

Mr. MARKEY. Without objection, it will be included.

Mr. ENGEL. Thank you. Last week, NTIA and the Department of Homeland Security announced the distribution of a $1 billion interoperability grant program that I, along with several of my colleagues on this committee, Mr. Stupak and others, set aside in the last Congress. The funding for this important program will come from the upcoming 700 MHz spectrum auction. This is just one example of how important the revenue from the auction will be. I urge the Commission to keep that in mind as they set out to create rules for the auction. I encourage the Commission to generate the largest amount of revenue from the auction and that it is reflective of the true value of the spectrum.

I am also concerned about placing unlicensed personal and portable devices in the TV band and the potential interference that can arise. Since 9/11, New York has had problems with its TV towers, making consumers in the market more susceptible to interference. Given the risks involved, I encourage the Commission to thoroughly test these new devices in areas like New York to guarantee there will be no interference to DTV receivers.

Finally, I would like to point out that just yesterday, Sirius and XM satellite radio announced that should the proposed merger be completed, they will be able to offer consumers a variety of programming options that can better fit individual tastes and financial flexibility in choosing their programming choices, so I again welcome the Commission today at this hearing. I am eager to hear what the commissioners have to say about these important issues and look forward to the opportunity to engage them during my question time. I thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from New York, Mr. Fossella.

Mr. FOSSELLA. No statement.

Mr. MARKEY. And I think that all time now for opening statements from members of the subcommittee has been completed, so we will turn to our very distinguished panel, the Federal Communications Commission, and first we will recognize the chairman of the Commission, Chairman Kevin Martin. We know that over the last month or so you have been in a competition with Job for all of the bad things that can happen to one family, but in my conversations with you, they all seem to be turning out well in the end and for that, we are all glad, and we don't mean to add to your woes yet today, but perhaps compared to what you have been through, this now is something that doesn't quite seem as onerous. We hope so, anyway. So we welcome you, sir, and whenever you are ready, please begin.

STATEMENT OF HON. KEVIN J. MARTIN, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. MARTIN. Thank you, and thank you for your comments about my personal situation. I appreciate it very much. Good morning, Chairman Markey and Ranking Member Upton and all the members of the committee. Thank you for inviting me to be here with you this morning. I will offer some brief comments, and then I look forward to hearing your thoughts and answering any questions you may have. Let me also say that I appreciate your flexibility and understanding in providing me some additional time to respond to your recent written questions in light of the recent eye surgery that I have had.

When I last appeared before you, I explained that the Commission was focused on accomplishing several critical goals: increased broadband deployment, encouraging wireless deployment, promoting competition, protecting consumers and enhancing public safety. We have continued to vigorously pursue these objectives during the past few months, and I look forward to continuing our dialog on the Commission's efforts.

This morning I would like to spend some time updating you on two key issues that have been at the forefront of Congress's attention and the Commission's agenda: the upcoming spectrum auction of the 700 MHz band and the DTV transition. Both of these issues present both great opportunities for consumers and difficult challenges for policy makers. In implementing Congress's directive to reallocate the airwaves, the Commission must balance often competing interests while maintaining its focus on serving the public interest and the American people.

The upcoming 700 MHz auction presents the Commission the opportunity to address several important policy goals. I believe I have put forth a fair and balanced plan that will help facilitate next generation wireless broadband services in both urban and rural areas; establish a public-private partnership to deploy a wireless broadband network for public safety that will address the interoperability problems of today's system; and provide a more open wireless platform that will facilitate innovation and investment.

One of the most important steps we can now take to provide affordable broadband to all Americans is to facilitate next generation wireless broadband service. A coalition of companies that support a national wireless broadband alternative, Intel, Skype, Yahoo, Google, DirecTV and EchoStar, urged the Commission to structure the auction in such a manner that it would maximize the opportunity for a new national wireless broadband service to emerge. They urged the Commission to make available at least one 11 MHz paired block offered over large geographic areas with combinatorial bidding so that national services could be established. I put forward a proposal that would meet these requirements. My proposal will also significantly increase opportunities for small and rural carriers to obtain spectrum at the auction as well. The proposed plan would provide for a variety of geographic license areas and spectrum block sizes. I am also proposing stringent build-out requirements, the strictest build-out that the Commission has ever proposed, to help ensure that the rural and underserved areas of

the country will benefit from the provision of new services that this spectrum can facilitate.

Meeting the needs of public safety is critically important. Recent crises like 9/11 and Hurricane Katrina have made us well aware of the problems that are created when public safety officials cannot communicate with one another. To that end, my proposal for the upcoming auction would help create a truly national interoperable broadband network for public safety agencies to use during times of an emergency. Many national and local public safety organizations expressed support for a public/private partnership approach. A national commercial licensee would work together with a national public safety licensee to build such a shared network. Providing for shared infrastructure will help achieve significant cost efficiencies, while maximizing public safety access to interoperable broadband spectrum. My proposal would also include a number of requirements and procedures to safeguard services to public safety entities and address concerns about the success of the partnership.

Finally, I have proposed that the license winner for about one-third of the spectrum be required to provide a platform that is more open to devices and applications. Consumers would be able to use the wireless device of their choice and download whatever software they want to use on this platform. Currently American consumers are too often asked to throw away their old phones and buy new ones if they want to switch cell phone carriers. And when they buy that new phone it is the wireless provider, not the consumer, who chooses the applications the consumer will be allowed to use on the Internet using that new handset. Wireless consumers in many other countries face far fewer restraints. For example, they can take their cell phones with them when they change carriers, and they can use widely available Wi-Fi networks available in their homes, and at the airport or at other hot spots, to access the Internet.

The upcoming auction provides us a rare chance to promote a more open platform, encourage wireless innovation without disrupting the existing networks or business plans. To be clear, I have not proposed to apply these same principles to the entire 700 MHz band or to the other existing networks. Nor have I proposed to apply network neutrality obligations, unbundling or mandatory wholesale requirements for this or any other block. I do believe, however, this modest step can help ensure that the fruits of innovation on the edges of the network swiftly pass into the hands of consumers. In addition, the Commission must recognize that spectrum is a unique public asset, and we must obtain a fair return on that asset for the American people.

To ensure that a fair price is paid, I have proposed a reserve price for this block of spectrum, as well as an overall reserve price for the entire auction. These reserve prices, which are based on the winning bids for the spectrum in our most recent AWS auction, will safeguard the value of the spectrum for the American taxpayers.

The second issue I would like to highlight briefly this morning is the broadcaster switch to digital television, digital technology itself. The transition will enable viewers to enjoy movie quality picture and sound, multiple program choices and interactive capabilities. Success, however, depends upon ensuring the appropriate poli-

cies are in place to minimize the burdens and the costs borne by consumers. It also depends upon Government and industry working together to promote consumer awareness. As I recently assured you, Chairman Dingell and Chairman Markey, the Commission is working consistent with its statutory authority and budgetary capacity to ensure that no American is left behind in this part of the digital revolution.

The Commission, therefore, has initiated several rulemaking proceedings designed to facilitate the upcoming transition. In one recent proceeding the Commission proposed to ensure that cable subscribers do not lose access to broadcast signals because of the digital transition. About 50 percent of cable subscribers today, at least 32 million people, 32 million households, subscribe to analog and not digital cable. These consumers are at risk of losing their ability to watch broadcast television after the digital transition unless the Commission acts. And just last week the Commission adopted a notice of proposed of rulemaking on several DTV education initiatives that were originally suggested by Chairman Dingell and Chairman Markey.

In addition to our policymaking activities, we have also been vigorously enforcing our digital transition-related rules. I recently presented my colleagues with a notice of apparent liability against several large retailers for violating the Commission's television labeling requirements. These fines in the aggregate total over $3 million. And finally, in addition to our policy and enforcement activities, we have devoted resources to promoting consumer awareness of the upcoming transition, through education and outreach efforts.

The Commission must keep working to ensure that through the upcoming wireless auction and digital transition, consumers are able to experience the best that technology has to offer. This means that we must work to both minimize the negative impact of the digital transition on consumers and introduce more competition and innovation in the wireless broadband market. By doing so, we can ensure that consumers can reap the vast rewards that the digital revolution offers. The Commission's ultimate trust and responsibility is, after all, the public interest, and it is from the public's airwaves that these opportunities flow. In both the 700 MHz auction and the DTV transition, we cannot lose sight of that goal.

Thank you very much, and I look forward to your questions.

[The prepared statement of Mr. Martin follows:]

Written Statement
Of

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission

Before the
Committee on Energy and Commerce
U.S. House of Representatives

July 24, 2007

Good morning Chairman Dingell, Chairman Markey, Ranking Member Barton, Ranking member Upton and Members of the Committee. Thank you for inviting me to be here with you this morning. I have a brief opening statement and then I look forward to hearing your thoughts and answering any questions you may have.

When I last appeared before you, I explained that the Commission was focused on accomplishing several critical goals -- increasing broadband deployment, encouraging wireless deployment, promoting competition, protecting consumers, and enhancing public safety. We have continued to vigorously pursue these objectives during the past few months.

The pro-competition policies that we have been furthering are designed to ensure that consumers benefit from innovation and technological advancements in all of the communications industries. For example, the Commission recently boosted competition in the delivery of voice and video services to people who live in apartment buildings. In a consistent and competitively-neutral fashion, we ensured that new entrants wanting to provide service to people who live in apartment buildings have the ability to use the internal wiring of both incumbent telephone and incumbent cable operators. Importantly, the Commission sought to support all new competitors, not one technology or one industry over another, and demonstrated its commitment to ensure that all consumers, regardless of where they live, benefit from competition in the voice and video markets.

In addition, we recently extended the disability access requirements of sections 225 and 255 – which formerly only applied to traditional phone services – to providers of Voice over Internet Protocol (VoIP). Congress sought to ensure that all Americans, including people with disabilities, benefit from

advances in technology. It is the Commission's responsibility to make this possible.

Promoting broadband access and affordability remains one of our top priorities. To this end, it is critical that we gain a better picture of broadband deployment in this country so that we can better calibrate our policies. I remain committed to improving our process, obtaining more and better information. Recently, we sought comment on improvements to the Commission's broadband data collection efforts, including collecting data on a more granular geographic basis. And, equally important, we sought comment on redefining the term "advanced services" to require higher minimum speeds. Given the evolution of technology and consumer expectations, we need our definition of broadband to keep up with the marketplace. We hope to move forward on these issues this fall.

The Commission has also been devoting significant time and attention towards completing its review of the media ownership rules. We must ensure that these rules take into account the competitive environment in which media companies operate and, at the same time, promote localism and diversity. A major part of our efforts in this regard has been collecting information through the media ownership hearings we have been holding around the country. Since I last testified before you, we have had two additional hearings – one media ownership hearing in Tampa, FL, and one localism hearing, in Portland, ME. And, we have scheduled our next media ownership hearing in Chicago on September 20th. Public input is critical to our process. Our efforts to collect a full public record will continue when we hold our final media ownership and localism hearings later this year.

I would like to spend some time updating you on two issues that have been and will remain at the top of the Commission's priorities – the upcoming spectrum auction in the 700 MHz band and the

DTV transition. These issues share a few things in common. First, both issues involve the same piece of our public airwaves. They also present both great opportunities for consumers and difficult challenges for policymakers. And, they both have been at the forefront of Congress's attention and the Commission's agenda.

The 700 MHz Auction

In implementing Congress' directive to reallocate the airwaves, the Commission must balance often competing interests while maintaining its focus on serving the public interest and the needs of the American people. Since I became Chairman, promoting broadband deployment has been one of my highest priorities. I am pleased that we have made significant progress. More work, however, still needs to be done.

One important factor spurring both increased broadband availability and reduced prices is competition among broadband platforms. All Americans should enjoy the benefits of broadband competition – availability, high speeds, and low prices. In much of the country, consumers have a choice of only two broadband services: cable or DSL. And in some parts of the country, consumers do not even have that choice. Wireless service is fast becoming critically important as another platform to provide broadband. One of the most important steps we can now take to provide affordable broadband to all Americans is to facilitate the deployment of a third "pipe" into the home. It is worth noting that wireless broadband is cost-effective to deploy not just in the big cities, but in rural areas, as well.

The upcoming auction presents the single most important opportunity for us to achieve this goal. Depending on how the Commission structures the upcoming auction, we will either enable the emergence of a third broadband pipe – one that would be

available to rural as well as urban American – or we will miss our biggest opportunity.

I have recently proposed rules for the 700 MHz auction that I believe will facilitate a national wireless broadband service. A coalition of companies that support a national wireless broadband alternative, Intel, Skype, Yahoo, Google, DIRECTV, and EchoStar, urged the Commission to structure the auction in such a manner that it would maximize the opportunity for a national wireless broadband service to emerge. They urged the Commission to make available at least one 11MHz paired block, offered over large geographic areas, with combinatorial bidding so that a national service could be established. I put forward a proposal that would meet these requirements.

My proposal would provide significant opportunities for small and rural carriers to obtain spectrum at auction as well. The proposed band plan would provide for a variety of geographic license areas and spectrum block sizes. I am also proposing stringent build-out requirements – the strictest build-out the Commission has ever proposed – to help ensure that the rural and underserved areas of the country will benefit from the provision of new services that this spectrum will facilitate. These build-out requirements include interim benchmarks and tough penalties. We also would permit higher power limits in rural areas, which will reduce the number of towers necessary to serve consumers and lower the cost of build-out.

Meeting the needs of public safety is critically important. During a crisis, public safety officials need to be able to communicate with one another. We are all aware of problems that have been created by the lack of interoperability for public safety during recent crises like 9/11 and Hurricane Katrina. To that end, my proposal for the upcoming auction would help create a truly national interoperable broadband network for public safety agencies to use during times

of emergency. I believe this proposal could offer many public safety benefits and is consistent with public safety's views on achieving an interoperable broadband network.

Many national and local public safety organizations have expressed support for a public-private partnership approach in which a national commercial licensee would work together with a national public safety licensee to build such a shared network. We must efficiently and effectively manage the 700 MHz spectrum allocated to both commercial users and public safety by Congress. My proposal will help the Commission ensure that public safety keeps pace with the advances in communications and gives first responders the broadband communications capabilities they need to protect safety of life and property of the American public.

Finally, I have also proposed that the license winner for about one-third of the spectrum be required to provide a platform that is more open to devices and applications. This auction provides an opportunity to have a significant effect on the next phase of wireless broadband innovation. A network more open to devices and applications can help ensure that the fruits of innovation on the edges of the network swiftly pass into the hands of consumers. Consumers would be able to use the wireless device of their choice and download whatever software they want.

Currently, American consumers are too often asked to throw away their old phones and buy new ones if they want to switch cell phone carriers. And when they buy that new phone, it is the wireless provider, not the consumer, who chooses what applications the consumer will be allowed to use on that new handset. Wireless consumers in many other countries face fewer restraints: for example, they can take their cell phones with them when they change carriers, and they can use widely available Wi-Fi networks – available in their homes, at the airport or at other hotspots – to access the Internet.

The upcoming auction provides a rare chance to promote a more open platform without disrupting existing networks or business plans. I have not, however, proposed to apply these same principles to the entire 700 MHz band or to other existing networks. Nor have I proposed to apply network neutrality obligations or mandatory wholesale requirements for this block or any other block.

In addition, the Commission recognizes that spectrum is a unique public asset, and that we must obtain a fair return on this asset for the American people. To ensure that a fair price is paid, I have proposed a reserve price for this block of spectrum, as well as an overall reserve price for the entire auction. If the reserve price is not met, the spectrum would be re-auctioned without the requirement for open devices and applications. These reserve prices, which are based on the winning bids for spectrum in our recent AWS-1 auction, will safeguard the value of the spectrum.

These issues have garnered a great deal of interest and commentary. I look forward to hearing from you and consulting with my colleagues on the Commission to finalize the rules in the next few weeks, enabling us to begin the auction by early next year.

The Digital TV Transition

The broadcasters' switch to digital technology will enable viewers to enjoy movie-quality picture and sound, multiple programming choices and interactive capabilities. A successful completion of the digital transition, however, depends upon ensuring that appropriate policies are in place to minimize the burdens and costs born by consumers. It also depends upon government and industry working together in promoting consumer awareness.

As I recently assured you, Chairman Dingell and Chairman Markey, the Commission is working, consistent with its statutory authority and budgetary capacity to ensure that no American is left behind in this part of the digital revolution.

For some time now, we have been working both on our own and in cooperation with industry, other government agencies, and consumer groups to advance the transition and promote consumer awareness. Our efforts to date have been three-fold. First, we have been working to get the right rules in place to facilitate a smooth transition. Second, we have been actively enforcing our rules to protect consumers. And, third, we have been promoting awareness of the transition through our consumer education and outreach efforts. Through all of our activities, the Commission has been dedicated to minimizing the negative impact of the digital transition on consumers while maximizing the benefits to them.

Without the proper policies in place, some viewers may be left in the dark or be unable to realize the full opportunities offered by digital technology. Such an outcome would be unacceptable.

The Commission, therefore, has initiated several rulemaking proceedings designed to facilitate the upcoming transition. In one recent proceeding, the Commission proposed to ensure that cable subscribers do not lose access to broadcast signals because of the digital transition.

About 50% of cable subscribers today - - at least 32 million people - - subscribe to analog not digital cable. These consumers are at risk of losing their ability to watch broadcast television after the digital transition unless the Commission acts. According to the 1992 Cable Act, cable operators must ensure that all local broadcast stations carried pursuant to this Act are "viewable" by "*all*" cable subscribers. The Commission is currently considering a rulemaking that would require cable operators to ensure their

analog customers don't lose their broadcast signals. Cable operators can either continue to carry signals in analog format to the millions of analog cable subscribers or alternatively, cable operators who have chosen to go all-digital can provide their subscribers with the necessary equipment to view broadcast and other channels.

One of the most important actions we have taken to facilitate a smooth transition is to ensure that electronics retailers fully inform consumers at the point of sale about the DTV transition date and the equipment necessary to continue to be able to receive over-the-air television signals.

Consumers have certain expectations and one of their expectations is that the television that they purchase today will also work two years from now. In April, the Commission released an order requiring retailers to disclose to consumers that a television with only an analog tuner will not receive over-the-air broadcast signals after February 17, 2009. Such notice should ensure that consumers are making a fully informed decision about the television that they seek to purchase *before* bringing it home. It will also help educate consumers about the upcoming digital transition.

And, just last week, the Commission adopted a Notice of Proposed Rulemaking on several DTV education initiatives that were originally suggested to us by Chairmen Dingell and Markey. This NPRM seeks comment on requiring broadcasters, multichannel video programming distributors, retailers and manufacturers to take certain actions to publicize the digital transition. I intend for the Commission to complete this proceeding expeditiously.

In addition to our policymaking activities, we have also been vigorously enforcing our digital transition-related rules. For example, as described above, in April we adopted labeling requirements to ensure that consumers are protected from the

unknowing purchase of television equipment without integrated digital tuners. As of July 19, 2007, Commission staff had inspected about 1030 retail stores around the country, as well as retailers' websites, to monitor compliance with our rules. As a result of these inspections, we issued over 262 citations notifying retailers of violations. As an outgrowth of our investigations, I recently presented my colleagues with Notices of Apparent Liability against seven large retailers for apparently violating the Commission's television labeling requirements. These fines, in the aggregate, total over three million dollars.

The Commission is also tracking down companies that continue to import or ship television receivers without DTV tuners, in violation of our rules. For example, on May 30, 2007, the Commission issued Notices of Apparent Liability against two companies – Syntax Brillian Corp. (approx. $2.9 million) and Regent USA, Inc. ($63,650). Our investigations in this area are continuing. Swift enforcement of all of our DTV-related rules is critical to protecting consumers from purchasing television sets that may be rendered useless in 18 months. Enforcement activities in this area will continue to be a priority for the Commission in the coming year.

In addition to our policymaking and enforcement activities, we have devoted resources to promoting consumer awareness of the upcoming transition through education and outreach efforts. Specifically, the Commission has prepared and disseminated numerous consumer publications to alert and inform consumers about the transition. For example, Commission staff recently revised one of our DTV fact sheets, entitled, "DTV is Coming (And Sooner Than You Think)," to add a section focused on helping consumers determine whether their current TV set contains a digital tuner or whether they will need to purchase a new one.

We have also partnered with several consumer organizations, such as CERC and NACAA, to help us disseminate DTV education information. Another important way we have been disseminating information is through our participation in events and conferences around the country. At such events, Commission staff can interact with individual consumers and give DTV-related information about the transition directly to them.

Our consumer outreach and education activities are geared in part toward reaching consumers who are likely to be unaware of the upcoming digital transition, including senior citizens, non-English speaking consumers, minority communities, people with disabilities, low-income individuals, and people living in rural and tribal areas. For example, earlier this month we held an Indian Telecommunications Initiative Regional Workshop in Albuquerque, NM. This workshop focused on the DTV transition with the goal of assisting Indian Tribes in preparing, organizing and conducting their own DTV awareness programs and initiatives. While there, we organized and conducted DTV panels, exhibited equipment, and distributed DTV education materials.

We also recently announced that we will host a DTV Consumer Education Workshop on September 26. This workshop, to be held at Commission headquarters, will consist of officials from organizations who represent a broad range of DTV stakeholders, including government agencies, industry, tribal organizations, disability community groups, non-English speaking groups, senior citizen organizations, low-income consumer representatives and other public interest organizations that may represent underserved customers or those living in rural areas. The purpose of this workshop will be to provide an opportunity for all interested parties to jointly discuss the challenges associated with the upcoming transition and explore ways in which these organizations can work together, in conjunction with the Commission, to develop coordinated consumer education activities.

In addition to furthering the activities already discussed, the additional funding we have requested from Congress will allow us to undertake several new initiatives that will greatly enhance our efforts to reach those consumers who currently rely upon over-the-air service. For example, in order to reach consumers more directly, additional funds would allow us to expand our dissemination of published materials through targeted direct mailings of DTV-related information to hundreds of thousands of households, with a focus on underserved communities and senior citizens. And, we could translate our DTV consumer education materials into languages other than Spanish, possibly including French and Mandarin, and distribute these materials through government and community organizations serving immigrants and non-English speaking consumers.

These are exciting and challenging times for consumers. We are in the middle of a digital revolution. With the upcoming 700 MHz auction and the digital transition, we are at a critical juncture. The government must set the right rules and policies in place to encourage the deployment of the next generation of infrastructure and the introduction and new and innovative services over this infrastructure. The Commission must keep working to ensure that through the upcoming wireless auction and digital transition, consumers are able to experience the best that technology has to offer. This means that we must work to both minimize the negative impact of the digital transition and introduce more competition in the broadband market. By doing so, we can ensure that consumers can reap the vast rewards the digital revolution offers.

The Commission's ultimate trust and responsibility is, after all, the public interest. And it is from the public's airwaves that these opportunities for innovation flow. In both the 700 MHz auction and the DTV transition, we cannot lose sight of that goal.

Thank you for your time and attention today. I appreciate the opportunity to share with you the Commission's current priorities and would be happy to answer any questions you may have.

Mr. MARKEY. We thank you, Mr. Chairman, very much. And now we will recognize the other commissioners, each for 5 minutes, to make opening statements if they should so desire. We will begin by recognizing Commissioner Michael Copps. Welcome, sir.

STATEMENT OF MICHAEL J. COPPS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. COPPS. Thank you, Mr. Chairman, and thank you all, members of the committee, for being here this morning. Let me use a few moments to focus on the same three priorities that I talked about last time we gathered together, public safety, media and broadband, because these are priorities that just do not go away.

First, public safety. The 700 MHz auction raises a lot of difficult issues, and you have raised many of them this morning. But the most important, by far, is how we use this auction to enhance the safety of the people. We have here a once-in-a-lifetime opportunity to provide the Nation's first responders with access to a nationwide interoperable broadband network. My first preference, by far, would have been a dedicated federally-funded network reserved solely for first responders. At this late date, that is apparently not to be.

Given this reality, I believe that pursuing a shared public/private model becomes the right choice. The challenge is to make sure that this network actually works for public safety. To me, this means it is built to public safety standards and that its effectiveness cannot be curtailed by commercial decisions, and it means strong ongoing FCC involvement all along the way. I can support public safety negotiating a network sharing agreement with a commercial licensee, but if that agreement is not sufficiently protective of public safety's interest, I believe the Commission must retain the right to reject it. I would rather go back to the drawing board than approve an arrangement that would compromise our Nation's first responders. This is one proceeding where we must not fail.

Second, media. This is so important to me because it is so important to our democracy. The good news is that the world has changed since the Commission's misguided media ownership proceeding 3 years ago. We can aim higher now. We still need to be vigilant about stopping bad new rules from being adopted, but I think there is an opportunity now and a real hunger out there to go back and change some of the bad old rules that helped get us in this mess in the first place. We can start with the FCC licensing process. Let us get back to an honest to goodness licensing system that doesn't grant slam dunk renewals but looks at whether a licensee is really doing his job to serve the local community. The FCC's lax licensing process no longer provides any incentive for broadcasters to do the right thing. Those that serve their local communities and those that do nothing receive the same rubberstamp renewal. It is time to end the free ride and require that all broadcasters meet certain minimum public interest obligations.

The other media issue desperately requiring our attention is the DTV transition. This one should keep us up at night. Huge and potentially very disruptive changes are on their way to TV consumers. Yet a survey earlier this year found that 61 percent of consumers still have no idea that the transition is coming and what is in

it for them. Contrast this with a report from the UK, where 8 in 10 are already aware of the switchover, and their transition runs from 2008 to 2012.

The first message that consumers hear cannot be about how to get a converter box for a transition they have never heard of before. We first need to explain to them why the transition is happening and how it benefits them. To the extent that consumers feel that this is something the Government is doing to them rather than for them, we will face a very messy backlash. So we had better do outreach in a more serious way. Web sites and pamphlets are fine, but they are not going to get the job done. The best way to reach analog television viewers is through analog television programming. And I want to thank Chairman Dingell and Chairman Markey for their suggestion that we consider mandatory public service announcements by broadcast licensees. That is a great idea.

Third, broadband. Our biggest infrastructure challenge as a Nation is bringing broadband to all of our citizens, and we are not doing a very good job. By any measure, no matter how you cut the salami or slice the baloney, Americans are getting too little broadband at too high a price. The 700 MHz auction could help turn this around. If we get it right, this auction offers the prospect of new competition, innovation and consumer choice, perhaps even a third broadband pipe. Here is another huge step we could take: include broadband as part of comprehensive Universal Service Fund reform to keep our Nation competitive in the global economy.

And I am going to end this statement like I ended my statement the last time, on the closed meeting rule. Think about this for a minute. This hearing is probably the only time before we five commissioners vote on the 700 MHz proceeding, with all of its far-reaching implications, the only time we will be able to talk about it together. Wouldn't it make more sense and wouldn't it be better for the country if we had some opportunity to sit down and have a full and frank discussion of all of these important proposals and all their implications? So I respectfully suggest again that you consider modifying the closed meeting rule so that more than two of us can meet and talk at one time.

Thank you for your attention, and I look forward to our conversation this morning.

[The prepared statement of Mr. Copps follows:]

TESTIMONY OF MICHAEL J. COPPS

Chairman Markey, Congressman Upton, members of the subcommittee: Thank you for the invitation to return here this morning. In this brief statement, I will focus on the same three priorities I discussed with you last time we gathered together—public safety, media, and broadband. They just don't go away.

First, public safety. Before us now is the 700 MHz auction. It raises many difficult issues, but the most important by far is how we use it to enhance the safety of the people. We have here a once-in-a-lifetime opportunity to provide the Nation's first responders with access to a nationwide, interoperable broadband network. My first preference—by a long shot—would have been a dedicated, federally-funded network reserved solely for first responders. At this late date, that is apparently not to be. Given this reality, I believe that pursuing a shared public-private model becomes the right choice. The challenge is to make sure that this network actually works for public safety. To me, this means it is built to public safety standards and that its effectiveness cannot be curtailed by commercial decisions. And it means strong, ongoing FCC involvement all along the way. I want to make one thing clear at the outset. I can support public safety negotiating a network sharing agreement with

a commercial licensee. But if that agreement is not sufficiently protective of public safety's interest, I believe the Commission must retain the right to reject it. I would rather go back to the drawing board—whatever the political consequences for doing so—than approve an arrangement that would compromise our Nation's first responders. In my visits with many of you, I have shared my belief that the FCC was less proactive and aggressive than it should have been following 9/11. Chairman Martin, to his credit, is working to reverse that, and I am working with him, and all of my colleagues, to make sure we get this particular proceeding right. We cannot—we simply cannot—fail.

Second, media. This is so important to me because it is so important to our democracy. Whatever great issues confront us—war and peace, health care, the education of our children, you name it—are filtered through the media. And Americans are rightly concerned when they feel that more and more of the information they receive is filtered for them by fewer and fewer big media giants.

The good news is that the world has changed since the Commission's misguided media ownership proceeding 3 years ago. We can aim higher now. We still need to be vigilant about stopping bad new rules from being adopted, but I think there is an opportunity now—and a real hunger out there—to go back and change some of the bad old rules that helped get us in this mess in the first place. With apologies to one past FCC Chairman, television is not a "toaster with pictures," and it's high time we cast that 1980s world-view aside and get to work creating a public interest standard for the 21st century.

We can start with the FCC licensing process. Let's get back to an honest-to-goodness licensing system that doesn't grant slam-dunk renewals but looks at whether a licensee is really doing its job to serve the local community. Did the station air programs on local civic affairs? Did it meet with local citizens to receive feedback? Is its children's programming really educational? And let's put that information up on the Web so citizens can know how their airwaves are being used. Of course many broadcasters want to serve their local communities. But the pressures of consolidation and the unforgiving expectations of Wall Street have made that difficult. Just as bad, the FCC's lax licensing process doesn't provide any incentive for broadcasters to do the right thing. Those that serve their local communities and those that do nothing receive the same rubber-stamp renewal. It's time to end the free ride and require that all broadcasters meet certain minimum public interest obligations.

The other media issue desperately requiring our attention is the DTV transition. This one should keep us up at night. Huge and potentially very disruptive changes are on their way to TV consumers—yet a survey earlier this year found that 61 percent of consumers still have no idea that the transition is coming and what's in it for them. The first message consumers hear cannot be about how to get a converter box for a transition they've never heard of. We first need to explain to them why the transition is happening and how it benefits them. To the extent consumers feel that this is something the government is doing to them rather than for them, we will face a very messy backlash.

So we had better do outreach in a more serious way. Web sites and pamphlets are fine, but they're not going to get the job done. The best way to reach analog television viewers is through analog television programming. I want to thank Chairman Dingell and Chairman Markey for their suggestion that we consider mandatory public service announcements by broadcast licensees. I hope that the Commission will act quickly on this suggestion, among others they made, and that this Committee will maintain its extremely beneficial oversight of the Commission's DTV consumer education efforts.

Third, broadband. My view of how we are doing has not changed much in the last four months. Our biggest infrastructure challenge as a nation is bringing broadband to all of our citizens, and we're not doing a very good job. Since we last convened, the OECD ranked the United States 15th in broadband penetration, down from 12th in 2006. But if you don't like that study, there are many others conducted by international organizations, industry associations, think tanks and business analysts that have us at 21st, 11th, 12th, or 24th. By any measure, we're getting too little broadband at too high a price. The 700 MHz auction could help turn this around. If we get it right, this auction offers the prospect of new competition, innovation and consumer choice—perhaps even a third broadband pipe. Here's another huge step we could take: include broadband as part of comprehensive Universal Service Fund reform to keep our nation competitive in the global economy.

I'll end where I ended last time—the closed meeting rule. Think about this: today is probably the only time before we vote that the five Commissioners will be in the same room to talk about the 700 MHz auction with all its far-reaching implications. Wouldn't it be better if we had some opportunity for full and frank discussion of

these important proposals? So I respectfully suggest that you consider modifying the closed meeting rule so that more than two of us can meet and talk at one time.

Thank you for your attention, and I look forward to our conversation this morning.

Mr. MARKEY. Thank you, Commissioner. And now we will hear from Commissioner Deborah Tate. Welcome.

STATEMENT OF DEBORAH TAYLOR TATE, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Ms. TATE. Good morning, Chairman Markey and esteemed members of the subcommittee. I have a brief opening but would request that my written statement be submitted for the record.

Mr. MARKEY. Without objection.

Ms. TATE. Thank you. I appreciate, obviously, the opportunity to appear before you all today. As I have stated before, I firmly believe that it is important for us to maintain a dialog about the issues that we are discussing today and those that we will discuss in the future at the FCC. At the outset I would like to commend Chairman Dingell and Chairman Markey, Ranking Members Barton and Upton, for their continued leadership in striving to meet the challenge of shaping our communications policies to keep up with the ever-changing digital world, in the best interest of the American public.

As noted, just since the last time that we were here before you just a few months ago, the communications marketplace has continued to evolve, with new ideas, new concepts, new devices and new technologies being announced almost every day. This constantly challenges us to adapt our regulations to these market changes. In doing so, wherever possible my goal is to promote balanced, technology-agnostic regulation, which provides incentives to continued investment and encourages innovation.

Today, I would like to take a moment to focus on three major areas. First is the important work that we do on behalf of children, families and consumers, including the areas of media and childhood obesity, as well as broadcast programming for children, both encouraging programming that is positive and family-friendly and healthy, as well as programming which may be having a negative impact on our children, specifically that we recently provided a violence report to Congress and appreciate Chairman Markey's hearing on that topic as well.

Other consumer-focused initiatives include soliciting input to broadcast ownership and localism across the country and our efforts to ensure that the public is fully educated regarding the DTV transition. We have also initiated steps to improve access to communications services for those with disabilities; to strengthen our safety and privacy rules; to protect the stealing of citizens' most private information.

Second, I would like to discuss the Commission's efforts at continuing to increase the deployment of broadband to all parts of this country. We launched two initiatives that will allow the Commission to gain an even better picture of broadband deployment, where it is and where it is not across the country, along with more accurate data. And I look forward to hearing more from you today, as

we continue to discuss the historic upcoming 700 MHz auction, which does present us with unprecedented and exciting opportunities for truly ubiquitous broadband to all corners of the Nation and for all Americans to access new innovations for their work, for entertainment, for education and for healthcare, as well as for our Nation's global competitiveness.

Last, I want to touch on I think what we all believe is the most important issue the Commission deals with, and that is public safety and homeland security. The upcoming 700 MHz auction also presents a unique opportunity to facilitate the establishment of this nationwide interoperable broadband communications network for the benefit of State and local public safety users and in the end, for every single American citizen.

Moreover, the Commission is evaluating whether we are measuring wireless E–911 location accuracy in the most appropriate manner and whether other new communications services should be required to send more accurate information. The Commission also continues to implement various recommendations of our independent panel reviewing the impact of Hurricane Katrina. As I heard in Mississippi, the dissemination of this vital information and interoperable communications are indeed the backbone of our defense not only against natural disasters but attacks on our homeland and the possibility of a pandemic health-related or environmental attack.

Again, I appreciate your invitation, and I am pleased to answer questions.

[The prepared statement of Ms. Taylor Tate follows:]

Written Statement of
Commissioner Deborah Taylor Tate

Good morning Chairman Markey, Ranking Member Upton, and distinguished members of this Subcommittee. I appreciate the opportunity to appear before you today. As I have stated in public and in private to many members of this Subcommittee, I firmly believe that it is important for us to maintain a dialogue about various issues currently or soon to be before us at the Federal Communications Commission.

At the outset, I want to commend Chairman Dingell, Subcommittee Chairman Markey, Ranking Member Barton, and Ranking Subcommittee Member Upton for their continued leadership in striving to meet the challenge of shaping our communications policy to keep up with an ever-changing world in the best interests of the American public.

Although it has only been a few months since the last hearing, the communications marketplace continues to evolve, with new ideas and technologies developing at an incredible pace. This constantly challenges us to adapt our regulations to these market changes. As I have stated before, in doing so, whenever possible, my goal is to promote balanced, technology–agnostic regulation, which provide incentives to investment and encourage innovation.

Today, I would like to focus on three major areas. First, I will focus on the work the Commission is doing on behalf of children, families, and consumers. Second, I want to discuss the Commission's efforts at increasing broadband deployment. Lastly, and most importantly, I want to address the issue of public safety and homeland security.

I have dedicated much of my professional life to addressing issues important to children and families, and I proudly continue that effort at the Commission through, among other things, my work on the Task Force on Media and Childhood Obesity. In addition, the Commission recently initiated a review of the status of children's television programming, and compliance with the Children's Television Act (CTA) to ensure that broadcasters are airing programming serving the educational and informational needs of children. The Commission also entered into a $24 Million Consent Decree with one broadcaster concerning its violation of the children's programming requirements requiring the implementation of a new, company-wide compliance plan. CTA requires the Commission to ensure that television broadcast station licensees provide programming specifically designed to serve the educational and informational needs of children and to limit the amount of advertising to which our children will be exposed during this programming. I take this congressional charge very seriously, especially given the prominent role that television plays in our children's lives. These actions underscore my – and, indeed, the entire Commission's – commitment to families all across America, who demand and deserve quality children's programming.

The Commission also recently submitted a report to Congress regarding the negative effects of violent programming on children. Like many of the parents, experts and health professionals we heard from, I am deeply concerned about the negative effects violent programming appears to have on our children. These are important issues, and I look forward to working with Congress and industry to tackle this problem.

A continuing challenge in this new digital age involves our review of the Commission's media ownership rules. We continue our important outreach initiatives all

across the country to solicit public input on ownership and localism. We have held four of our planned six ownership field hearings in various locations across the country, in Los Angeles, California; my hometown of Nashville, Tennessee; Harrisburg, Pennsylvania; and Tampa, Florida. We have scheduled the fifth hearing for Chicago, Illinois on September 20, 2007.

We have also conducted five of the scheduled six field hearings on the subject of localism. Hearings were conducted in Charlotte, North Carolina; San Antonio, Texas; Rapid City, South Dakota; Monterey, California; and most recently, last month in Portland, Maine.

I have been struck by the thoughtful testimony that we have received at these proceedings from members of the public, as well as representatives of industry, educators, public interest organizations and others, concerning the impact of our ownership rules on the important service that radio and television stations provide to their communities. I recognize the vital role that the broadcast media play in our democratic society and look forward to working with my Commission colleagues and members of this Subcommittee to ensure that, after full consideration of the sizable record that we have compiled, our actions further the touchstone goals of competition, localism, and diversity.

Another issue important to consumers relates to the ever-approaching deadline of February 17, 2009, by which all television licensees must relinquish their analog authorizations and convert to digital operation. We continue to work with licensees and broadcast industry groups such as the National Association of Broadcasters to make this transition as smooth as possible by finalizing digital channel assignments, and disposing of the various requests by licensees associated with the construction of each station's

digital facilities. We have also worked with the National Telecommunications and Information Administration and with industry leaders to ensure that members of the public are fully and timely educated about the DTV transition and the converter box coupon program that NTIA is administering. In May of this year, our new rules went into effect requiring all retailers of televisions that do not contain a digital tuner to display a consumer alert at the point of sale disclosing that such sets will require a converter box to receive over-the-air broadcast television signals after the February 2009 transition. Our Enforcement Bureau has vigorously enforced this requirement, issuing hundreds of citations where retailers were not complying with this requirement. We will continue to proceed with these and other efforts to ensure that all members of the public are fully educated about the DTV transition.

The Commission also continues to improve access to communications services for persons with disabilities by requiring interoperability among competing video relay service providers and approving innovative new services. Most recently, on June 15, 2007, the Commission extended the disability access requirements to providers of interconnected Voice over Internet Protocol (VoIP) services and to manufacturers of specially designed equipment used to provide these services. The Commission also extended the Telecommunications Relay Services (TRS) requirements to providers of interconnected VoIP services, including requiring interconnected VoIP providers to offer 711 abbreviated dialing for access to relay services. Of course, more work lies ahead to ensure that we responsibly manage our obligations to achieve functional equivalence for all Americans. Congress intended for *all* Americans to benefit from those advances in telecommunications services and equipment, and our action does just that, both by

stabilizing the funding base for TRS services and by extending accessibility requirements to the interconnected VoIP services which millions of Americans are now substituting for traditional voice service.

Along with Congress, the Commission has been active in helping protect the privacy of confidential and delicate consumer information. We took the important step of strengthening our privacy rules to prevent the abhorrent practice of pre-texting to obtain consumer's private phone records to ensure the privacy of consumer information maintained by telecommunications carriers. I am pleased that the rules we adopted will go a long way toward closing off the avenues that information snatchers have repeatedly used to violate the privacy of consumer phone records.

Coming to the Commission, as I do, from Nashville, Tennessee, home to more than 80 record labels, 180 recording studios, and some 5,000 working union musicians, I have been particularly concerned by allegations that payola, or "pay-for-play," practices are prevalent in the commercial radio industry. The Commission entered into consent decrees with four broadcasters to pay an aggregate $12.5 million to resolve these types of violations. We have ongoing payola investigations involving other broadcasters, and will endeavor to ensure that, should we conclude that violations have occurred, any action we take will similarly be designed to further eliminate these illegal industry practices.

In addition to these important issues, I have been busy working with my Commission colleagues and members of this Subcommittee to encourage the further deployment of new and innovative services and to foster competition. Participation in the digital age requires broadband, and it is essential that we create an environment that maximizes its deployment.

I am not alone in this opinion. Every member of this Commission has voiced the need for ubiquitous, affordable broadband; and Members of Congress have clearly indicated their belief that the Commission must do more to get broadband services deployed to all Americans.

The availability of ubiquitous, reliable, high-speed broadband access already is changing the way Americans work and live, but we must act to ensure that the unprecedented business, educational, and healthcare opportunities that broadband makes possible are available to all Americans, regardless of where they chose to live.

The Commission has recently taken some very important steps. The Commission launched the broadband data NPRM that will allow the Commission to gain an even better picture of broadband deployment in this country. We are asking questions about how we can obtain more specific information about broadband deployment and consumer acceptance in specific geographic areas and how we can combine our data with that collected at the state level or by other public sources. By improving our data collection, we will be able to identify more precisely those areas of the country where additional broadband deployment is needed.

In addition, the Commission also commenced our fifth inquiry into whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. In this inquiry, we seek information on all aspects of broadband availability, including price and bandwidth speeds. In particular, we are studying whether, given the evolution of technology and the marketplace, we should redefine the term "advanced services" to require higher minimum speeds.

Between these two proceedings, it is my hope that the Commission will solicit the information necessary to better assess the competitive progress in the broadband market and provide additional important progress towards our goal of universal affordable broadband access for all Americans.

In addition, the Commission is considering how to structure the upcoming 700 MHz auction to best enable the further deployment of wireless broadband services and mobile video, especially to rural communities. The inherent propagation characteristics of the 700 MHz band could make it less expensive to construct new networks covering larger geographic areas, making the spectrum ideal for expanding the availability of broadband in rural areas. At the same time, the band potentially provides better in-building coverage than higher frequencies, which not only would facilitate the provision of advanced services in urban areas but also could help improve 911 access and location system performance. The sooner the auction begins, the closer we will be to reaping the benefits of services provided via this prime spectrum. I look forward to working with my colleagues to move this forward expeditiously.

Meeting the goal of providing broadband throughout this vast and geographically challenging country will not be easy. It cannot and should not be up to government alone. But with American ingenuity, corporate commitment, the promise of new jobs to economically depressed areas, and reduced healthcare costs, we all can be part of the solution.

On April 16, 2007, the Commission released a Notice of Inquiry of broadband industry practices. The proceeding is designed to enhance our understanding of the behavior of broadband market participants- including network platform providers,

broadband Internet access service providers, Internet backbone providers, and content and application providers. Noting the Internet Policy Statement, we sought specific information about the behavior of market participants. Thus, we inquired as to nature of the market for broadband services, whether network platform providers and others favor or disfavor particular content, how consumers are affected by such policies and whether consumer choice of broadband providers is sufficient to ensure that all such policies ultimately benefit consumers. We also sought specific examples of beneficial or harmful behavior and inquired whether any regulatory intervention is necessary. The record in that proceeding closed on July 16, 2007.

Finally, I would like to touch on what is perhaps the Commission's most important area of authority, the crucial issue of public safety and homeland security. As mentioned earlier, the Commission is considering how to structure the upcoming 700 MHz auction. Not only is this spectrum important to potentially further deployment of wireless broadband services, the band potentially provides better in-building coverage than higher frequencies, which could help improve 911 access and location system performance.

The Commission's Public Safety and Homeland Security Bureau has also been active and has hosted a First Responders Summit focusing on public safety communications. The summit included expert panels composed of representatives from the public safety community, government, and the communications industry and a roundtable discussion on key issues related to emergency preparedness and response.

In addition, on May 31, 2007, the Commission implemented various recommendations of the Commission's Independent Panel Reviewing the Impact of

Hurricane Katrina on Communications Networks. The Commission intends for the programs and policies stemming from the Panel's work to improve emergency response capabilities and assist first responders, the communications industry and all levels of government to communicate effectively with one another during emergencies. The order mandates certain proactive steps for telephone service providers and commercial mobile service radio providers to ensure preparedness for future emergencies. The requirements include installation of emergency power generators and for service providers to establish basic interoperability methods. The Commission also directed its Public Safety and Homeland Security Bureau to develop and implement an awareness program to educate public safety agencies about alternative communications technologies, establish a method to ascertain communication systems status during an emergency, and to ensure that first responders have the proper credentials to accomplish their jobs during an emergency.

This is a significant step towards ensuring that the Commission and the industries that it regulates are better prepared to respond in the face of natural disasters and other types of incidents, such as a pandemic, industrial accident, environmental incident, or terrorist attack.

I applaud the collaborative efforts and contributions of the communications industry and public safety entities such as the National Emergency Number Association and the Association of Public Safety Communications Officials, which have worked hard to address the policy goals and technical issues that make these necessary improvements possible. My colleagues and I are keenly aware of how critical reliable communications technologies are when public safety or homeland security concerns become paramount. I am confident that the Commission will continue to do all that it can

to strengthen and protect our Nation's communications infrastructure, and I am eager to work with Congress as we continue to address policies that will help improve our public safety and homeland security.

Again, I appreciate your invitation to be here with you today. I look forward to hearing from you, and I will be pleased to answer any questions.

Mr. MARKEY. Thank you, Commissioner, very much. And now we will hear from Commissioner Jonathan Adelstein. Welcome.

STATEMENT OF JONATHAN S. ADELSTEIN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. ADELSTEIN. Mr. Chairman and members of the subcommittee, thank you very much for inviting me to testify here today and discussing the challenges ahead of us. My goal is certainly to keep all of our communities connected and to bring the latest technologies into the reach of everyone in this country.

One of our central national priorities that this committee has talked about so much is performing the widespread deployment of affordable, truly high-speed broadband. Broadband allows our citizens to expand their economic, their educational, and their healthcare opportunities. As we saw last night in Charleston by way of the YouTube debate, it is revolutionizing the way that citizens participate in the democratic process. To make sure that all of our citizens can reap the benefits of these opportunities, we need to make sure that broadband is the dial tone of the 21st century, available and affordable to everyone.

While we have made progress, we have failed to keep pace with our global competitors. For Americans in rural areas, for low-income consumers and small businesses, the problems are even more acute. The problem lies in that citizens of other countries are getting a much better broadband value in the form of more megabits for less money. This is more than a PR problem. It is a major productivity problem for our economy, and we have got to do better. It is time to stop making excuses and to start making solutions. We have got to engage in a concerted effort to restore our place as the world leader in telecommunications. All of our citizens need access to affordable, true broadband, capable of carrying voice, data and video.

An issue of this importance to our future warrants a comprehensive national broadband strategy. A true broadband strategy should incorporate benchmarks, deployment timetables and measurable thresholds to gauge our progress. As Congresswoman Capps noted, we need to set ambitious goals, beginning with updating our current anemic definition of broadband at just 200 kilobits per second to something more akin to that used by our global competitors in other countries that are magnitudes higher. We need more reliable specific data than the FCC currently compiles, as you also suggested, so we can better ascertain our current problems and develop responsive solutions. We should give Congress and consumers a clear sense of the price per megabit and better mapping of broadband availability, as you have suggested, Mr. Chairman. Our strategy has got to include incentives for investment, promote competition, and preserve the open character of the Internet. We have got to channel universal service support also toward broadband deployment. I detail in my written testimony many more steps that Congress can take outside the purview of the FCC, implementing a truly national broadband strategy.

Another critical component for promoting broadband and providing competition is maximizing the potential spectrum-based services. We have heard a lot this morning about the upcoming 700

MHz auction and how we can use that to best facilitate the development of broadband. We have a historic opportunity with this auction to make sure that we do facilitate the emergence of a third broadband channel—I don't call it a pipe, I call it a third broadband channel—into the home, because in this case we are talking about wireless. That could provide a truly high-quality national wireless broadband network, identifying spectrum on which to establish a meaningful open access environment to promote badly needed broadband competition over these airwaves. The spectrum also gives us new opportunities, as my colleagues have said, to come to grips with our Nation's public safety dilemma.

In our immediate agenda we face key issues, including media ownership, particularly among women and minorities, as Congressman Rush noted, public interest and localism obligations. I have traveled to hearings across the country and in many of your districts. I have participated with some of you, such as you, Congressman Inslee. We have heard from the people, and I can report that the concern remains very high among many of our citizens about the negative impact of consolidation on competition, localism and diversity. With 18 months before the end of the analog broadcasting era, we need greater national attention on the impending DTV transition, as Congressman Engel noted. While we have made some progress, more focused leadership is certainly needed from us at the FCC. I think the failure to run a well-coordinated transition plan would lead to a tsunami of consumer complaints from disenfranchised viewers. And you would certainly hear from them in Congress, we would hear about it at the FCC, and all the affected industries would hear as well.

And as Congresswoman Solis noted, we need to reach especially out to hard-to-reach communities, such as those that don't speak English as their primary language, elderly, minorities, many other communities that need special attention to make sure that they all hear about it and those communities particularly that rely heavily on over-the-air television.

To better manage this potential disruption, I recommended that the FCC take strong action. We should establish a clear national message among Federal, State and local and tribal governments, we should coordinate the array of industry activities, and we should create a Federal DTV transition task force, once and for all. FCC action on these initiatives is already overdue, and we certainly appreciate the leadership of Chairman Dingell and Chairman Markey. The letter that you sent us has certainly encouraged us along, and I think we are better along the way as a result of your efforts on that front.

Congress charged us with keeping the American public well connected and well protected, and I will do everything I can as a commissioner to make sure that I implement the laws as you have intended. Thank you for your leadership, and thank you for the opportunity to testify here today. Thank you.

[The prepared statement of Mr. Adelstein follows:]

STATEMENT OF
JONATHAN S. ADELSTEIN
COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

BEFORE THE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

JULY 24, 2007

Mr. Chairman, Congressman Upton, and members of the Subcommittee, thank you for inviting me to testify about the challenges confronting our Commission. In the interest of time, I would like to focus today on three among the many urgent priorities we face. First, I will discuss the need for a national broadband strategy to ensure the ubiquitous deployment of affordable, high speed broadband infrastructure to every corner of this country. Second, I will touch upon the role of spectrum-based services, and the importance of the upcoming 700 MHz auction, as a critical aspect of that national strategy. And third, I would like to highlight the pressing media agenda, involving media ownership, including women and minority ownership, public interest and localism obligations, and the need for strong leadership by the Commission to ensure a successful and smooth transition to digital television.

The Need For a National Broadband Strategy

We need to maximize the potential of every citizen to contribute to our social, cultural and economic life through communications, whether they live in major cities or in rural, insular or other high-cost areas, whether they are Native Americans living on tribal lands or residents of economically challenged sections of our inner cities, whether they live with disabilities, whether or not they speak English, and regardless of their income level. I would like to talk to you today about this guiding principle for communications policy and a few of the ways we at the FCC and

you in Congress can and must work to achieve this ambitious goal. We need to make broadband the dial-tone of the 21st Century.

Keeping our communities connected and ensuring that the latest technologies reach all Americans, including those in remote and underserved areas, are principles that are enshrined in the Communications Act. Meeting these goals is more important than ever as we enter a new age of global competitiveness.

We've made progress, and there are many positive lessons to draw on, but I am increasingly concerned that we have failed to keep pace with our global competitors over the past few years. Each year, we slip further down the regular rankings of broadband penetration. For Americans in rural areas, low income consumers, and small businesses, the problem can be even more acute. According to the ITU, the digital opportunity afforded to U.S. citizens is 21st in the world.

While some have protested the international broadband penetration rankings, the fact is the U.S. has dropped year-after-year. This downward trend and the lack of broadband value illustrate the sobering point that when it comes to giving our citizens affordable access to state-of the-art communications, the U.S. has fallen behind its global competitors. There is no doubt about the evidence that citizens of other countries are getting a much greater broadband value in the form of more megabits for less money. This is more than a public relations problem. It is a major productivity problem, and our citizens deserve better. Indeed, if we do not do better for everyone in America, then we will all suffer economic injury as a result. In this broadband world, more than ever, we are truly *all* in this together and we need to tap all of our resources.

Some have argued that the reason we have fallen so far in the international broadband rankings is that we are a more rural country than many of those ahead of us. Even if that is the

case, and since geography is destiny and we cannot change ours, rather than merely curse the difficulty of addressing rural communications challenges, we should redouble our efforts and get down to the business of addressing and overcoming them.

I am concerned that the lack of a comprehensive broadband communications deployment plan is one of the reasons that the U.S. is increasingly falling further behind our global competitors. Virtually every other developed country has implemented a national broadband strategy. This must become a greater national priority for America than it is now. We need a strategy to prevent outsourcing of jobs overseas by promoting the ability of U.S. companies to "in-source" within our own borders. Rural America and underserved urban areas have surplus labor forces waiting to be tapped. No one will work harder, or work more efficiently, than Americans, but many are currently without opportunities simply because the current communications infrastructure is inadequate to connect them with a good job. That situation must improve.

A National Broadband Strategy for All Americans

We must engage in a concerted and coordinated effort to restore our place as the world leader in telecommunications by making available to all our citizens affordable, true broadband, capable of carrying voice, data, and video signals. An issue of this importance to our future warrants a comprehensive national broadband strategy that targets the needs of all Americans. A true broadband strategy should incorporate benchmarks, deployment timetables, and measurable thresholds to gauge our progress.

We need to set ambitious goals and shoot for real high-bandwidth broadband deployment. We should start by updating our current anemic definition of high-speed of just 200

kbps in one direction to something more akin to what consumers receive in countries with which we compete, speeds that are magnitudes higher than our current definitions.

We must take a hard look at our successes and failures. We need much more reliable, more specific data than the FCC currently compiles so that we can better ascertain our current problems and develop responsive solutions. The FCC should be able to give Congress and consumers a clear sense of the price per megabit, just as we all look to the price per gallon as a key indicator of consumer welfare. Giving consumers reliable information by requiring public reporting of actual broadband speeds by providers would spur better service and enable the free market to function more effectively. Another important tool is better mapping of broadband availability, which would enable the public and private sectors to work together to target underserved areas. Legislation under consideration by leaders in both the House and the Senate would enable us and other agencies like the Census Bureau to make enormous progress on this front.

We must redouble our efforts to encourage broadband development by increasing incentives for investment because we will rely on the private sector as the primary driver of growth. These efforts must take place across technologies, so that we not only build on the traditional telephone and cable platforms, but also create opportunities for deployment of fiber-to-the-home, fixed and mobile wireless, broadband over power line, and satellite technologies. We must work to promote meaningful competition, as competition is the most effective driver of innovation, as well as lower prices. Only rational competition policies can ensure that the U.S. broadband market does not devolve into a stagnant duopoly, which is a serious concern given that cable and DSL providers now control 96 percent of the residential broadband market. If communities need to tap their own resources to build broadband systems, they should be able to

do so to make it truly affordable and accessible to all of their citizens. We must also work to preserve the open and neutral character that has been the hallmark of the Internet, in order to maximize its potential as a tool for economic opportunity, innovation, and so many forms of public participation.

There also is more Congress can do, outside of the purview of the FCC, such as providing adequate funding for Rural Utilities Service (RUS) broadband loans and grants and establishing new grant programs supporting public-private partnerships that can identify strategies to spur deployment; ensuring RUS properly targets those funds; providing tax incentives for companies that invest in broadband to underserved areas; devising better depreciation rules for capital investments in targeted telecommunications services; investing in basic science research and development to spur further innovation in telecommunications technology; and improving math and science education so that we have the human resources to fuel continued growth, innovation and usage of advanced telecommunications services.

Another critical component of a national broadband strategy is properly channeling universal service support toward broadband deployment. Congress and the Commission recognized early on that the economic, social, and public health benefits of the telecommunications network increase exponentially for all subscribers with the addition of each new subscriber. Federal universal service continues to play a vital role in meeting our commitment to connectivity, helping to maintain high levels of telephone penetration and increasing access for our nation's schools and libraries. With almost a decade behind us since the 1996 Act, the FCC is re-examining almost every aspect of our federal universal service policies, from the way that we conduct contributions and distributions, to our administration and

oversight of the fund. As we move forward with this review, I will continue to work to preserve and advance the universal service programs as Congress intended.

Ensuring the vitality of universal service will be particularly important as technology continues to evolve. Increasingly, voice, video, and data will flow to homes and businesses over broadband platforms. In this new world, as voice becomes just one application over broadband networks, we've got to have ubiquitous broadband pipes to carry the most valuable IP services everywhere. Without such broadband networks, IP services can't reach their full audience or capability. The economic, public health, and social externalities associated with access to broadband networks will be far more important than the significant effects associated with the plain-old-telephone-service network, because broadband services will touch so many different aspects of our lives. So, it is important that the Commission conduct its stewardship of the program with the highest of standards and that we ensure that universal service evolves to promote advanced services, which is a priority that Congress has made explicitly clear.

Wireless: A Critical Source of Broadband Services

One of the best opportunities for promoting broadband and providing competition across the country, and a key component of a national broadband strategy, is in maximizing the potential of spectrum-based services. Spectrum is the lifeblood for much of this new communications landscape. The Commission must do more to stay on top of the latest developments in spectrum technology and policy, working with both licensed and unlicensed spectrum.

We are now considering final service and auction rules for the 700 MHz band, a critical opportunity for our country and the next generation of wireless broadband service providers.

The Commission has a historic opportunity in the upcoming 700 MHz auction to facilitate the emergence of a "third" broadband channel that will provide consumers everywhere the benefits of a high-quality wireless broadband network.

My goal is to provide an auction structure that promotes opportunities for all bidders, including new entrants as well as existing providers. I am also interested in identifying spectrum on which to establish a meaningful open-access environment. Such an approach could open these key airwaves to badly needed competition in the broadband space.

As we look to the auction structure, some have argued that a more flexible band plan which includes a mix of licenses could better support a variety of business plans. On the other hand, a larger spectrum block could best address the needs of potential new entrants, who express interest in providing a nationwide wireless broadband service.

This spectrum also gives us a new opportunity to come to grips with our country's public safety dilemma. Many of our nation's public safety agencies already suffer from antiquated systems and struggle to keep pace with new technological opportunities. So as we look to finalize our 700 MHz rules, we need to explore all aspects of proposals intended to help public safety keep apace through this auction.

The past several years have seen an explosion of new opportunities for consumers, like Wi-Fi, satellite-based technologies, and more advanced mobile services. We now have to be more creative with what I have described as "spectrum facilitation." That means looking at all types of approaches – technical, economic, or regulatory – to get spectrum into the hands of operators ready to serve consumers at the most local levels possible.

Of course, licensed spectrum has and will continue to be the backbone for much of our wireless communications network. We are already seeing broadband provided over satellite,

new wireless broadband systems in the 2.5 GHz band and the increasing deployment of higher speed mobile wireless connections from existing cellular and PCS providers.

I have also worked closely with the Wireless Internet Service Provider (WISP) community, which has been particularly focused on providing wireless broadband connectivity in rural and underserved areas. Unlicensed spectrum is free and, in most rural areas, lightly used. It can be accessed immediately, and the equipment is relatively cheap because it is so widely available. We can do even more for rural WISPs and other unlicensed users. I have heard from operators who want access to additional spectrum and at higher power levels. And the Commission has been doing just that. We have opened up 255 MHz of spectrum in the 5 GHz band – more spectrum for the latest Wi-Fi technologies – and are looking at ways to increase unlicensed power levels in rural areas.

I also have pushed for flexible licensing approaches that make it easier for community-based providers to get access to wireless broadband opportunities. We adopted rules to make spectrum in the 3650 MHz band available for wireless broadband services. To promote interest in the band, we adopted an innovative, hybrid approach for spectrum access. It makes the spectrum available on a licensed, but non-exclusive, basis. I have spoken with representatives of the Community Wireless Network movement, and they are thrilled with this decision and the positive impact it will have on their efforts to deploy broadband networks in underserved communities around the country.

We have also made spectrum available in the 70/80/90 GHz band for enterprise use. This spectrum block can be used to connect buildings with gigabit-speed wireless point-to-point links for a mile or more. Instead of digging up streets to bring fiber to buildings, licensees can set up a wireless link for a fraction of the cost -- and the spectrum is available to anyone holding a

license. While others supported an auction, I successfully argued against them in this unique case, because I was concerned that auctions would raise the price of access and shut out smaller licensees.

We are now even looking to allow unlicensed operations in unused television spectrum bands – the so-called "white spaces." It is a challenging proposal, but one that could allow for unlicensed use of spectrum that has exceptional propagation qualities. We have an obligation to look at the interference implications of such a proposal, and it will be a major proceeding at the Commission this upcoming year.

Media Ownership, Localism, and Implementing a Successful DTV Transition

The Commission is now engaged in a top-to-bottom review of all of our media ownership and localism rules. We have held hearings across the nation, both as a full Commission and as individual members, to assess how the public views the "public interest." I can report that concern remains high among many of our citizens about the negative impact of consolidation on competition, localism and diversity. As we conduct the Congressionally-mandated review of our rules, we need to keep Congress' public interest mandate foremost in our mind. Any changes we contemplate must address the dismal state of women and minority ownership. Also, all studies that the FCC has commissioned must undergo peer review by other objective, unassociated academics and be subject to public comment.

The charge to promote the public interest also deserves fuller consideration as we promote the digital TV transition. The Commission has had before it an open Notice of Inquiry on the public interest obligations of broadcasters in the digital age since 1999, yet it has not taken the critical step of issuing a Notice of Proposed Rulemaking which would afford an opportunity

to actually consider specific public interest obligations. It is high time we consider what additional obligations should accompany the additional opportunities afforded to broadcasters through digital broadcasting.

With eighteen months before the end of analog broadcasting, I believe there is a critical need for greater national attention on the impending DTV transition. While we have made some progress, more focused leadership is needed. Currently, the DTV preparedness effort lacks a clear national message and a coordinated set of industry activities. To begin to address the general lack of public awareness, the Commission needs to develop a unified, coherent message among federal, state, local, and tribal governmental entities, and to coordinate the message and its delivery with the efforts of the broadcast, cable, satellite, and consumer electronics industries.

Failure to administer a comprehensive and well-coordinated national DTV transition plan will almost certainly result in a tsunami of consumer complaints to Congress, the FCC and the affected industries from disenfranchised viewers across the country. To better manage this potential national disruption, I have recommended establishing a clear chain of command by creating a Federal DTV Transition Task Force. While the NTIA is principally charged with administering the converter box program, the FCC's technical and consumer outreach expertise makes us especially well-suited to spearhead a national consumer education initiative. In a taskforce, the two agencies could work collaboratively and dedicate staff resources to develop a unified federal message about the DTV transition, and to inform consumers about options they have to continue receiving broadcast programming after February 17, 2009.

Conclusion

Congress has charged the Commission with ensuring that the American public stay well-connected and well-protected, directing us in the very first section of the Communications Act

with making available to "all the people of the United States" rapid, efficient Nation-wide communications services. I take this charge seriously in doing all that I can to implement the laws you have enacted.

Thank you for your leadership and for the opportunity to testify before you today.

Mr. MARKEY. Thank you, Commissioner, very much. And our final commissioner, Rob McDowell. Whenever you are ready, sir, please begin.

STATEMENT OF ROBERT M. MCDOWELL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. MCDOWELL. Thank you, Mr. Chairman and Ranking Member Upton, Mr. Shimkus and other distinguished members of the subcommittee. Thank you for inviting us to appear before you this morning. Since we last met on March 14, the Commission has taken a number of significant steps that are bringing new technologies to consumers, increasing competition and lowering prices. Before us are some of the most important issues ever reviewed by the FCC, so it is timely that we appear before you today to answer your questions and exchange views on these critical matters.

This year in particular the Commission is in an excellent position to ensure that the wireless marketplace is open to an even wider variety of entities. I have been focusing on creating new opportunities for all types of spectrum license applicants as well as unlicensed operators. In March, I supported our action to classify wireless broadband Internet access service as an information service and therefore create regulatory parity. This determination, which the Commission had previously taken for Internet access over cable modem, wireline and powerline facilities, will maximize innovation and consumer benefits by ensuring that the market-driven framework established by Congress is fully realized as wireless services continue to flourish and evolve.

With respect to spectrum license applicants, the chairman recently circulated a draft order setting forth service rules and other policies pertaining to the 700 MHz band. In my deliberations over this important proceeding, I am considering many ideas that could provide meaningful market entry opportunities, including the pros and cons of various geographic market sizes, different ideas for dividing the available spectrum, geographic-based versus population-based build-out requirements, and creating the proper mix of incentives that would facilitate a public/private partnership to build and operate a nationwide broadband public safety network. As always, I look forward to hearing your views on these important issues.

With respect to unlicensed spectrum use, the Commission's Office of Engineering and Technology, or OET, as we call it, is completing its testing of several devices developed for use in the spectrum located in between TV channels, also known as the white spaces. I understand that OET is on course for reporting these testing results later this month and to make them available for public comment. Our goal is to finalize rules this fall. I am optimistic that technological innovation in this area will yield progress towards many of the public policy goals being discussed today, including some issues being analyzed in the 700 MHz proceeding.

In the media sector we have made several strides to further the digital transition. I was pleased to support several Commission actions that will enable progress in the digital transition for television and radio. We have provided a progress report on the digital TV transition and proposed deadlines and procedures to facilitate the broadcasters' final steps toward meeting the February 17, 2009

deadline and required that retailers disclose to consumers that analog tuner televisions will not be able to receive over-the-air broadcast signals without a converter box, after the transition.

For radio, we adopted an historic order that established rules for in-band, on-channel technology. These flexible rules will expedite the transition to terrestrial digital radio and provide higher-quality audio, diverse programming and innovative data services to the public, on free over-the-air stations. We also have made strides toward regulatory parity among competitors in the multi-channel video distribution marketplace, by opening a proceeding on exclusive contracts for video service in multiple-dwelling units and issuing an order on building access for such providers.

With the advent of the triple play of video, voice and high-speed Internet access being offered by cable, telephone and other companies, it is important that the Commission's regulations treat similarly-situated competitors the same when possible. In the wireline arena we have received the Joint Board on Universal Service recommendation to adopt an interim cap on the amount of support a competitive eligible telecom carrier can receive. I am studying the positions of the parties in that proposal and look forward to receiving more recommendations regarding fundamental reform later this year. And I thank my three colleagues who serve on that joint board, Chairman Martin and Commissioners Copps and Tate, for their tireless efforts in pursuit of meaningful universal service reform.

Regarding special access, we recently acted to refresh the record of that proceeding, an updated record that better reflects today's marketplace. It will hopefully provide us with the data necessary to render a timely decision. And finally, we initiated a Notice of Inquiry concerning the state of the market for broadband and related services. This should provide us with a record to judge whether additional policies regulating the Internet are warranted or not.

In conclusion, I am still optimistic that America's communications future is very bright. I look forward to continuing to work with my fellow commissioners and you, the Congress, to resolve these important issues so that our policies bring new technologies to American consumers. Thank you.

[The prepared statement of Mr. McDowell follows:]

STATEMENT OF ROBERT M. MCDOWELL

Good morning Mr. Chairman and distinguished members of the subcommittee. Thank you for providing us with this opportunity to appear before you this morning. Since we last met in March, the Commission has taken a number of important actions that I would like to highlight for you.

WIRELESS

We have been busy on the wireless front. This year in particular the Commission is in an excellent position to ensure that the wireless marketplace is open to a wide variety of entities. We have been working hard to create new windows of opportunity for all types of spectrum license applicants, as well as unlicensed operators.

In March, I supported our action to classify wireless broadband Internet access service as an information service and, therefore, create regulatory parity. This determination, which the Commission had previously taken for Internet access over cable modem, wireline and powerline facilities, will maximize innovation and consumer benefits by ensuring that the market-driven framework established by Congress is fully realized as wireless services continue to flourish and evolve.

With respect to spectrum license applicants, following the Further Notice of Proposed Rulemaking adopted in April, the Chairman recently circulated a draft order setting forth service rules and other policies pertaining to the 700 MHz band. As you know, Congress has mandated that this spectrum be auctioned no later than January 28, 2008. As a result, I am currently actively considering many ideas intended to stimulate meaningful opportunities, including, for instance, geographic market sizes, construction requirements, and possible incentives for the private sector to partner with public safety agencies. As always, I am interested in hearing your views regarding this important proceeding, and I am pleased to have an opportunity to do that in person today.

With respect to unlicensed spectrum operators, at this time, the Commission's Office of Engineering & Technology (OET) is completing its rigorous testing of a number of protocol devices developed for unlicensed use in the spectrum located in between the TV channels. I understand that OET is on-track for reporting these testing results later this month and that the chairman intends that the Commission finalize rules this fall. Of course, the technology innovation spurred by the Commission's leadership in the white spaces proceeding plays a critical role in the wireless marketplace, including fostering job growth and related business opportunities. I am optimistic that technological innovation in this area will yield progress toward many of the public policy goals being discussed today.

I am hopeful that our work to prepare for the 700 MHz auction and future deployment in the white spaces, along with the certainty created by our action to classify wireless broadband Internet access service as an information service, will broaden the opportunities available to entities seeking to enter the global wireless marketplace, whether as licensees or as unlicensed service providers.

MEDIA

In the media sector, we have made several strides forward as well, particularly with respect to the digital transition for both television and radio, as well as taking steps toward regulatory parity among competitors in the multichannel video distribution marketplace.

In March, we adopted a historic order for the radio industry. In the order, we adopt service rules and other licensing and operational requirements for terrestrial digital radio using in-band, on-channel (IBOC) technology. Our rules provide both the regulatory certainty and the flexibility that the broadcasting industry needs to expedite the transition to digital radio and to provide higher quality audio, diverse programming and innovative data services to the public on free, over-the-air stations. Our Order enables broadcast entrepreneurs to bring to the marketplace this powerful new technology—which enables a single station to provide multiple streams of programming—to the benefit of all American consumers.

In April, I was pleased to support several Commission actions taken to further the digital television transition. First, in a Notice of Proposed Rulemaking, we provided a progress report on the digital transition and proposed deadlines and procedures to ensure that the February 17, 2009 transition date is met and to offer regulatory flexibility to broadcasters to facilitate their construction of digital facilities by the deadline. Since Congress established the transition deadline, the Commission has moved beyond simply ensuring that stations were capable of operating in digital to focus on facilitating broadcasters' construction of their final, post-transition channel facilities. In this Notice, we analyze and consider the specifics on when stations may and must cease analog operations, when they may and must begin operating on their post-transition digital channel and what regulatory flexibility we can provide to ensure that the complicated, coordinated switch to DTV becomes a reality.

To address the issue of consumer education about the DTV transition, we also issued an order that requires that retailers disclose, at the point of sale, that televisions that include only an analog tuner will not be able to receive over-the-air broadcast signals without a converter box after February 17, 2009. The disclosure requirements we adopted will ensure that consumers have this material information before they make a purchase. One of the biggest challenges the Commission faces over the next 2 years is moving our Nation from analog to digital television with minimal consumer disruption. Consumer education about the transition to DTV has been limited so far. This order takes a big step forward to educate consumers.

Given Congress's DTV deadline for broadcast stations, the natural next step for the Commission is to review how cable operators will carry the broadcasters' digital signals. In April, I was pleased to support a notice of proposed rulemaking in which we seek comment on the obligations of cable operators, after the conclusion of the digital transition, to ensure that the digital signals of "must carry" stations are not materially degraded and are viewable by all cable subscribers, as required by law.

Even though broadcasters will be all digital by the deadline, some analog cable equipment will remain in cable systems and in the homes of cable subscribers. Accordingly, we must address how to ensure that cable subscribers are able to view the higher quality signals provided by the broadcast stations in their communities. The notice initiates our review.

The Commission also has been working to achieve regulatory parity between incumbent telephone companies, incumbent cable companies and new entrants into the voice, video and data markets. To help create an environment where investment, innovation and competition can flourish, it is imperative that government treat like services alike, preferably with a light regulatory touch. With the advent of the "triple play" of video, voice and high-speed Internet access services being offered by cable, telephone and other companies, it is important that the Commission's regulations treat all competitors the same when possible.

In March, we issued a notice of proposed rulemaking to uncover whether there is a need for the Commission to regulate exclusive contracts for the provision of video services to multiple dwelling units (MDUs) and whether the Commission has the authority to craft such regulations. In the notice and in an order adopted in May on access to wiring inside MDUs, we examine building access issues in a platform neutral manner with respect to all video providers, be they telephone companies, incumbent cable providers, over-builders or others. I hope that competition for all services, and across all platforms, does not stop, literally, at the doorstep of apartment and office buildings across America.

PUBLIC SAFETY AND HOMELAND SECURITY

In addition to considering the public safety matters related to the 700 MHz band, which I discussed earlier, I have supported a number of recent actions in support of public safety and homeland security efforts. First, in May, I voted to approve a Notice of Proposed Rulemaking that invites comment and debate on a proposal that would require licensees subject to our Enhanced 911 rules to satisfy a more stringent location accuracy requirement. Certainly it is of paramount importance that E911 service satisfies the needs of public safety personnel, as well as the expectations of America's wireless consumers, and I am hopeful that our inquiry will serve as a positive start to a challenging task.

Also in May, the Commission took steps to increase the reliability, security and efficacy of the Nation's Emergency Alert System (EAS) network to enable Federal and state authorities to communicate rapidly with the public in times of crisis. Specifically, we adopted an order that: requires EAS participants to accept messages using Common Alerting Protocol (CAP) when CAP is approved by FEMA; requires common carriers providing video service to participate in EAS as broadcasters and cable and satellite providers already do; and permits the transmission of state-level EAS alerts that are originated by Governors or their designees. This Order establishes a framework for the next generation of EAS, which through innovative technologies will provide a redundant, more resilient system for delivering emergency alerts. The upgraded EAS that CAP will enable also will ensure better outreach to all Americans, including non-English speakers and persons with hearing and vision disabilities.

I also supported our action to move forward on a number of the recommendations made by the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks. I found this action to be particularly constructive in that our efforts regarding emergency preparedness have broad applicability, given the need to plan for not only natural disasters such as hurricanes, but also for incidents like terrorist attacks, influenza pandemic outbreaks and industrial accidents. Any of these emergencies could result in sudden and significant shortages of personnel, a surge in communications traffic, possible disruptions to communications networks (due to increased telecommuting during an influenza pandemic, for example), and lack of manpower to immediately repair affected communications networks. I am pleased that we have built upon the lessons learned from the Hurricane Katrina disaster to promote more effective, efficient response and recovery efforts, as well as heightened readiness and preparedness.

SATELLITE

In April, I was pleased to support a constructive step forward to create new opportunities for more competition in the satellite industry. The services offered in the 17/24 GHz band will include standard-definition and high-definition formats, and will provide a mix of advanced, multi-media services to residential and business subscribers located not only in the continental United States but in Alaska and Hawaii as well. I am particularly pleased that these new rules require operators to

construct each satellite to accommodate the provision of service to Alaska and Hawaii in the event the satellite reaches, or is moved to, an orbital location that would provide this coverage. Because of our light regulatory touch, this action will ease the ability of diverse entrants to introduce exciting new services to American consumers living in urban, rural and insular areas.

WIRELINE

We have received the Federal-State Joint Board on Universal Service recommendation to adopt an interim, emergency cap on the amount of universal service high-cost support that competitive eligible telecommunications carriers receive. The Joint Board is considering more fundamental reform recommendations to the Universal Service Fund which we expect to receive sometime this fall. Now that comments on the interim cap recommendation have been filed with the Commission, I look forward to working with my fellow Commissioners to forge a solution to the crisis facing the Universal Service Fund.

On July 9, the Commission requested parties to refresh the record in the special access proceeding. I support this opportunity for parties to supplement their comments to reflect the mergers and the GAO Special Access study so that we will have a complete record to determine the best approach. I would support an effort to make a decision at a time when the Chairman sees fit.

In March, I supported a Notice of Inquiry that asks broad questions about the state of the market for broadband and related services, whether abuses are occurring in the market that affect the offering of content on the Internet or the development of new technologies, and the ultimate effect on consumers. This gives parties who fear market failure an opportunity to present evidence, of which we have none. It also gives those who argue that the market is working well and no further regulation is needed to make their case. Now that comments have been filed, I am reviewing the record to see whether additional policies related to regulating the Internet are warranted.

In summary, I continue to be optimistic that our Nation's communications future holds great potential for consumers. I look forward to working with my fellow Commissioners, with your continued guidance, to bring new technologies to the marketplace.

Mr. MARKEY. Thank you, Mr. Commissioner. And now the Chair will recognize himself for a round of questions.

When you go into a store to buy a TV, the person in the store doesn't ask you: "Do you subscribe to Verizon or Comcast or Time Warner? Do you have DirecTV? Do you have cable?" You just buy the TV set, and you assume it is going to work with all of them. So my question to the commissioners is this: Chairman Martin has a proposal that for one-third of the spectrum, that Carterfone principles will apply for that part of the spectrum. You will be able to take your device that you purchase with you from one service to another. But no matter what device you buy, you will be able to use it on that part of the spectrum. Do you agree with that, Commissioner Adelstein?

Mr. ADELSTEIN. Well, I certainly do. I have looked at what is going on in Europe and Asia, and they have much more flexibility there. We had a group of frustrated entrepreneurs from Silicon Valley that came before us.

Mr. MARKEY. So your answer is yes?

Mr. ADELSTEIN. Yes.

Mr. MARKEY. You do support?

Mr. ADELSTEIN. Yes.

Mr. MARKEY. Commissioner Copps?

Mr. COPPS. Yes, I do, as one of the folks who pushed for principles of access.

Mr. MARKEY. Your answer is yes?

Mr. COPPS. My answer is yes.

Mr. MARKEY. Commissioner Tate?

Ms. TATE. I know that you want me to have an answer, Mr. Chairman, but at this point I really don't. I am still weighing all the commenters. I have a meeting with Google and other people this afternoon that I haven't met with since the chairman's item was put out on the floor. So as to this I have an open mind.

Mr. MARKEY. As a consumer, would you want to be able to use any device that you purchase with the cell phone service that you have?

Ms. TATE. As a consumer, yes, sir.

Mr. MARKEY. Thank you. Commissioner McDowell.

Mr. MCDOWELL. Thank you, Mr. Chairman. I am still studying the issue as well. I would like to see the marketplace go there. The question is whether it goes there through a natural evolution or through a Government mandate.

Mr. MARKEY. We waited for 100 years for the marketplace to give people a choice of black rotary dial phone in everyone's living room or something else, and the marketplace never went there because the telephone companies never gave people that option. So this is the opportunity for the Federal Communications Commission to give people an option to do so.

Mr. MCDOWELL. I understand it is an open situation. It is very fluid. I have an open mind on all of this, but I do look at the fact that we have about 10 Wi-Fi enabled phones that are usable on any Wi-Fi network. Some are proprietary. That would be probably on the order of about 14 phones there in the industry. I believe that the walled garden model is one that is doomed to fail. Just go ask America Online about that. But at the same time——

Mr. MARKEY. So right now your answer is yes or no?

Mr. MCDOWELL. I am considering all of the arguments.

Mr. MARKEY. OK, please do so, and please let me keep my phone and let me take it wherever I want. I would ask that of you. Commissioner Tate, in your joint letter with Chairman Martin to me about childhood obesity and children's TV advertising you stated, "restrictions on the type of advertising that airs during children's programming may be necessary, absent sufficient industry guidelines." We recently had 11 food companies come forward with voluntary pledges, but other than Disney, which I praise, and Sesame Workshop, which I do as well, we do not have similar commitments from broadcasters or, importantly, cable programmers such as Viacom and Time Warner. Do you continue to believe that the Commission may have to act in this area if the media companies do not take voluntary action soon?

Ms. TATE. Well, I continue to be optimistic that they will. And in fact, the reason that our childhood obesity task force, I think, was so important is because it did bring together not only the food and beverage companies and all of those folks that are involved in the food preparation in our country, but it also brought together the advertisers and the media.

Mr. MARKEY. So is your answer a yes, that you think that we may have to——

Ms. TATE. My answer is that I would like to wait until September to see what comes out of our obesity task force.

Mr. MARKEY. And if they don't, if the media companies don't make any commitment to protect children, do you think the Commission will have to act?

Ms. TATE. I would certainly be open to reviewing it at that point.

Mr. MARKEY. I would strongly urge that that be the case. And Chairman Martin, millions of consumers pay a wireless termination fee of $175 or $200. This inhibits the ability of a consumer to switch carriers. Often a consumer has a fee renewed when a consumer extends service, or adds minutes to a plan, without getting a new phone. Do you think that these plans are unfair, too high, anti-competitive? Could you give us your view?

Mr. MARTIN. Sure. I am concerned about some of the practices that are going on in the wireless industry, as it relates to early termination fees, particularly when you talk about early termination fees, that the arguments for why the carriers are all imposing them is to recoup the cost of the equipment and yet that equipment is something that the consumers are not allowed to take with them afterwards. So I think that there are some practices I am concerned about.

Mr. MARKEY. Would it undermine your wireless Carterfone proposal if that particular issue is not fixed?

Mr. MARTIN. I don't think it would necessarily undermine it, but I think it is something that the Commission is going to have to look at trying to address in a comprehensive way, anyway.

Mr. MARKEY. And I hope that you do that as well. I just, again, feel that consumers are put in a very unfair position in their relationship with their phone companies. Let me now turn and recognize the gentleman from Michigan, Mr. Upton.

Mr. UPTON. Well, thank you, Mr. Chairman, and I apologize to the commissioners for having stepped away. We had an important issue on the House floor that dealt directly with my State, and I needed to participate, and we will have a vote on that a little bit later this afternoon.

Chairman Martin, it is clear from Google's filing this last Friday that they probably have no intention of participating in the auction unless you give them all of the conditions that they are asking for. So if that is the case, why not just drop the conditions and have a fair auction rather than jeopardize the spectrum and the auction proceeds, with the complicated reserve price and perhaps delay and even the need for a re-auction of that part of the spectrum?

Mr. MARTIN. The proposal I have put forth isn't designed to facilitate the entry of any one particular company. Indeed, it isn't the plan that has been proposed or supported by any company. I think it is actually, though, the plan that is in the best interest——

Mr. UPTON. So everyone is against it?

Mr. MARTIN. I am not sure consumers will be against it. I actually think consumers will like the ability to take devices from one service to another. The criticisms that have come forth from the wireless industry about consumers not wanting to be able to take devices from one network to another are very similar to the criticisms they put forth saying that consumers didn't want to take their telephone number from one service to another. And they all said that if consumers wanted that, the wireless industry would have provided it on its own. As soon as the Commission required

it, 32 million consumers switched wireless carriers and took their telephone number with them. I think this is another example of where, just because the wireless companies haven't offered, it doesn't mean consumers won't want it. While I admit that there isn't a company that supports what I propose, I think consumers will.

Mr. UPTON. Well, all of us are aware of the difficult business environment that newspapers are experiencing today, and we know that the Tribune Company has filed for a temporary waiver to the FCC's cross-ownership rule so that in fact it can reorganize. I know that you have received letters and comments from both sides of the aisle, including just from this committee, Mr. Rush, Hastert, Shimkus, as well as Senators Reid, Durbin, Schumer, asking to move expeditiously, and certainly, as you know, I have associated myself with their comments. Are you able to give us the status and the potential timeframe for where things may be in terms of reviewing this and taking some action?

Mr. MARTIN. Sure. That merger application was filed. The comments have just finished coming in on that. We try to review those kind of mergers within 180 days, which would put this merger, that would put the Commission considering this transaction sometime in the fourth quarter of this year. And while it is very complicated and obviously raises a lot of controversial issues, I would hope that we would be able to try to meet that same kind of timeframe that we have tried to do on other complicated and contentious mergers.

Mr. UPTON. By some estimates, the unencumbered auction could bring in as much as $20 billion. The CBO number was a little lower than that, but I think many of us think that we will be able to hit that $20 billion. But if we have this proposal with the minimum reserve price with an encumbered provision, there are a number of folks who actually think that that price may be less than that, in terms of the calculations. If the reserve price isn't met, which spectrum gets re-auctioned and when? And if there is a re-auction, if that does happen, how are you going to be able to meet the statutory requirement that the proceeds be deposited by June 30, 2008, in terms of making the accommodations that you will have to make?

Mr. MARTIN. Well, if the reserve price isn't met, then all of the commercial spectrum would end up being re-auctioned, with the exception of the public safety private partnership, to make sure that that piece that was already put forward to address the public safety needs, which is the most critical and most important issue, is maintained. All of the rest would be re-auctioned without the imposition of that condition.

Mr. UPTON. And how quickly could that happen?

Mr. MARTIN. We think that the auction would easily be able to still be completed in time to have the proceeds provided under the statutory timeframe by the middle of next summer, about a year from now.

Mr. UPTON. OK, thank you. I yield back.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from Pennsylvania, Mr. Doyle.

Mr. DOYLE. Thank you, Mr. Chairman. Chairman Martin, in April of this year you said, "Depending on how we structure the upcoming auction, we will either enable the emergence of a third broadband pipe, one that would be available to rural as well urban America, or we will miss our biggest opportunity." In June you told the USA Today that you wanted an auction where consumers can "use any wireless device and download any mobile broadband application with no restrictions." And in the draft order on the DTV spectrum auction, you established a reserve price of $4.6 billion, showing you are committed to making sure this auction pays the Treasury. I think these are three very important principles, and I agree with each one of them, and none of them are mutually exclusive. I ask you today, do you still agree with these principles, Mr. Chairman?

Mr. MARTIN. I do, I do.

Mr. DOYLE. Thank you. I have looked at a lot of proposals for the DTV spectrum auction and the only idea that meets each of those three tests is a wholesale model. Now, AT&T endorses open devices; that is great. But that is one part of the problem. Open platforms, like wholesale, fix the other part of the problem. People tell me that might be fine, but it won't draw enough bidders to meet the reserve price. Well, Google put up and made the opening bid. Tell me, Commissioner Copps, because my time is limited, what do you think of the wholesale model generally and what Google and others like Frontline, Free Press, and the Wireless Founders Group are asking for specifically?

Mr. COPPS. Well, I think it is time for us to use part of the spectrum, this one-third of the spectrum, to be a little creative and to be a little innovative to try a new model. Others have gone down this line in other countries, to their benefit and to our discomfort. We need, as several members have pointed out, to encourage new entrants. We need small business and rural consumers. We need minorities. These auctions have been somewhat stacked in favor of incumbents over the years, with the tremendous resources they have. If we are going to ever get innovation and creativity, this is the time to do it, so I think that is why we ought to be entertaining these proposals for wholesale open access.

Mr. DOYLE. Chairman Martin, do you agree with that?

Mr. MARTIN. I am concerned about the imposition of the additional wholesale requirement. It is not only that you want someone to meet the reserve price, but you also want to have the maximum incentive for them to invest in the underlying wireless network. I am concerned about the impact that a wholesale requirement might make on their willingness to invest in the build-out of that network. I don't think that the kind of open platforms, where you have to be open to devices and software, should in any way impede their ability to invest in the underlying towers for a network. But I am concerned that if they have to sell the access to those towers at a discounted price, they might be less willing to build out the network. So that is why I am concerned about that additional condition.

Mr. DOYLE. Commissioner McDowell, if we don't wholesale, how can we guarantee a new competitor, a new entrant, into the market?

Mr. MCDOWELL. Well, Congressman, I have been focused on smaller market sizes, and I think that addresses a lot of the public policy concerns here. If we have a variety of market sizes, small, medium and large, for small, medium and large bidders to bid on, we have a home for the large carriers, a home for the medium sized carriers and then a home for entrepreneurs. This is a last 20-mile technology, not a last mile technology, and it holds tremendous potential, but it also holds tremendous potential that we might have a local, small-town entrepreneur or a regional entrepreneur like Stelera, who testified before this committee a couple of weeks ago, that may be interested. So we are talking about a third broadband pipe. Actually, we have the potential here for six more broadband pipes to go to American consumers, depending on which band plan you want to pick. So if we have small, medium and large market sizes available, I think that would solve the open access issue that folks are looking at. It would solve the build-out provision, the build-out concerns, as well. And also let us not forget what we are doing in the white spaces. Our white spaces proceeding is really all about open access and will hopefully be a constructive, positive, disruptive force.

Mr. DOYLE. Thank you. And Commissioner Adelstein, 30 seconds, because I have one more question I want to ask you all. Do you think that wholesaling locks in a business model, or does it guarantee, no matter who wins, new competition?

Mr. ADELSTEIN. I think it is more likely to guarantee new competition. The beauty of wholesale is, no matter who wins, and the large incumbents could win as well as Google or anybody else, that they have to provide open networks. They have to provide for competition and all kinds of new entrants with new applications and new ideas can get involved, can use that small—small licensees as well. Small operators can use that on a wholesale basis. I think it really opens up a whole world of competition.

Mr. DOYLE. Thank you. One final question for the panel. In 2004 the FCC issued a report to Congress on a low-power FM interference testing program, after getting public comment on the engineering studies it commissioned. After reviewing all the facts, the data and potential for interference, the FCC said in the report, "Congress should readdress this issue and modify the statute to eliminate the third adjacent channel distance separation requirement for LPFM stations." Does anyone disagree with that? Mr. Chairman, let the record show that the silence was deafening. My friend Lee Terry and I have a bill to allow the FCC to expand the benefits of low-power FM on to more places on the radio dial across the country. This has been critical during emergencies like Hurricane Katrina, to religious groups trying to spread their message, and to community groups interested in serving their communities. It is my hope that the Commission will continue to support these stations until and after we get this bill signed into law. And I yield back.

Mr. MARKEY. The gentleman's time has expired. The Chair recognizes the gentleman from New Jersey, Mr. Ferguson.

Mr. FERGUSON. Thank you, Mr. Chairman.

Mr. MARKEY. Excuse me. I am sorry. The gentleman from Nebraska, Mr. Terry. I apologize to the gentleman.

Mr. TERRY. I love it. Thank you, Mr. Chairman. First, I want to ask Chairman Martin about the joint board's recommendation that caps CETC carriers. I have written a letter suggesting that was a proper move at the right time. I am wondering if the entire board, if the FCC is discussing how to handle that recommendation.

Mr. MARTIN. Sure. We certainly are, and I plan on trying to address some kind of, and potentially multiple kinds of, reform for the Universal Service Fund, and I think that trying to establish a cap is an important measure in trying to control the growth that occurred on the CETC side. Since I came to the Commission, the first year I was there, they received about a million dollars. Last year they received a billion dollars in universal service subsidy support. And at that kind of growth rate, I am concerned we can't afford to continue to do that, so some kind of change has to be done. I think a cap is one option. I would support that. There may be other options, but I would support something to control the growth of the fund.

Mr. TERRY. I appreciate the comment about supporting something. In the Terry-Boucher Bill, one of the issues with just generically new entrants, we feel that we should look at actual cost.

Mr. MARTIN. Yes.

Mr. TERRY. And I will open it up to anyone on the board if they want to discuss the caps versus actual costs or maybe even a combination of them.

Mr. MARTIN. I think that that would, I think, require everyone to plot their own actual cost. To meet the same kind of standard that is done for the incumbents would be another good reform. I think either one would control the growth of the fund, and so I would support either, but I can——

Mr. TERRY. What are you hearing from your comments, from the comments submitted to the FCC?

Mr. MARTIN. I think that there are obviously some that are concerned about, some companies that are concerned about it, but I think that it is important for the Commission to try to take some measure of reform to control the growth in the fund. So I hope that we will get support for one of those kind of proposals.

Mr. TERRY. Commissioner Copps?

Mr. COPPS. I think it is time for the Commission to catch up with folks like you and others in Congress who have urged general comprehensive universal service reform. I have suggested that one thing that Congress could do would be to give us the authority to collect on intrastate funding, but also, we need the inclusion of broadband on both sides of the equation. I would support the idea of getting rid of the identical support rule and doing audits, and I think if we would do those four things, we would have a pretty good running start on doing something serious about universal service and crafting it for the 21st century.

Mr. TERRY. I respect and appreciate those criteria. Commissioner Adelstein?

Mr. ADELSTEIN. Well, I think the Boucher-Terry Bill is loaded with provisions that would help us to secure the future of universal service and make sure that it was run in a fiscally responsible manner at the same time. Certainly expanding broadband into supported services makes imminent sense. I think expanding the con-

tribution base is something that would make it better for everybody. We need to tighten CETC criteria, as you suggested. I think it is a great idea to eliminate the identical support rule. It doesn't make any sense to have people pay to their universal service on the basis of somebody else's costs and not their own. Three years ago I called for that, and I dissented over on the joint board. I can't believe we didn't do it, and I think it is well overdue that we control costs through that mechanism immediately.

Mr. TERRY. I appreciate that. Commissioner Tate?

Ms. TATE. Yes, Congressman, and I want to thank you for all your efforts on your bill, and I want to make clear that when the joint board made this decision, certainly it wasn't looking at this as a long-term solution and said that in its decision. And I agree. Certainly we need to target this to unserved areas, which was the entire purpose underlying that and that it doesn't make sense to fund multiple carriers when we have decided that an area is a high-cost area to serve. So the other thing, I guess, that I wanted to say is regarding the joint board recommendation and that is that it is really when you asked the chairman about the comments, it has really spurred a lot of excellent comments, some suggestions of pilots in areas and certainly back to your point of having more cost-based subsidies.

Mr. TERRY. I appreciate that. Commissioner McDowell?

Mr. MCDOWELL. Thank you, Congressman. There are a couple of items, in particular, in your bill that I like, which is to base support on actual cost and thereby eliminate the identical support rule. I think the identical support rule is illogical. As well as allow the targeted use of support to more specific wire centers, at the wire center level. I came to this job with five principles in mind regarding USF reform, and No. 1 on that list is to slow the growth of the fund; also to broaden the contribution base, among others; make sure it is competitively neutral; and I think anything we can do to go in that general direction is positive and constructive.

Mr. TERRY. Very good, since all of those principles are inherent to this bill. Chairman Martin, are there any parts of the discussion of universal service reform that are necessary for Congress to do versus what you can do on your own at the FCC?

Mr. MARTIN. There are several proposals for us to expand the contribution base in a more technologically neutral manner. We can move to collecting universal service estimates based upon telephone numbers. That is within our current authority. Several people have proposed that the Commission should also expand that to look at including inter- and intrastate revenue so that it would no longer try to make that distinction. That is something the Commission could not do; Congress would have to do.

Mr. TERRY. All right, so we would have to do that. All right. Any other items that you feel that you would prefer, at least, to have legislative——

Mr. MARTIN. On this or any issue, I always prefer to have legislative guidance on exactly what you end up doing. But even if not, I think we have the authority to do most of the other proposals, most of them.

Mr. TERRY. Thank you, Chairman. Commissioner Adelstein?

Mr. ADELSTEIN. One thing that we could really use congressional help on is adding intrastate revenues into the base. That would make the base much larger and much fairer for everybody. I think it is also important that we, as you suggested, exempt universal service from the Anti-Deficiency Act and that is something we could use help from Congress on. And of course we would welcome your guidance on clarifying how support for CETCs could be handled.

Mr. TERRY. Anybody else?

Mr. COPPS. I think that legislative involvement is necessary from the statutory standpoint on intrastate contributions. I think it is desirable but not necessary in clarifying to all of us the proper role of broadband in the universal system, where I think we already have authority but have been a little bit reluctant to exercise that authority.

Mr. TERRY. Very good. I appreciate that. Mr. Chairman, I will yield back my time.

Mr. DOYLE [presiding]. I thank the gentleman. The Chair now recognizes the chairman of the full committee, the gentleman from Michigan, Mr. Dingell, for 5 minutes.

Mr. DINGELL. Mr. Chairman, thank you. This question, members of the Commission, is for all the commissioners. I am pleased that the Commission is considering adopting rules that would enhance consumer choice in the wireless device and application markets. I am concerned, however, that this new approach could possibly lead to higher prices for consumers, either for services or for handsets.

Now, ladies and gentlemen, because of the limits on time, I would very much appreciate a yes or no answer to this question, and we will start with the chairman. Are all of you confident that this proposal will not result in higher consumer costs? Mr. Chairman?

Mr. MARTIN. I don't think that it will result in higher consumer costs, particularly when you allow for competition in those handsets.

Mr. DINGELL. Could the other commissioners please respond?

Mr. COPPS. Yes, I am confident.

Mr. DINGELL. Commissioner?

Mr. ADELSTEIN. Yes.

Mr. DINGELL. Madam Commissioner, yes or no?

Ms. TATE. I hope that it will not.

Mr. DINGELL. Hope. Sir?

Mr. MCDOWELL. No, I am not confident, Mr. Chairman.

Mr. DINGELL. Now this question, again, for all commissioners. Members of the Commission, this relates to blind bidding. One of the goals of the auction that is going to occur on the 700 MHz band should be to facilitate new entry into the broadband market. That is congressional policy, and I am sure that it is the policy of the Commission. Some have argued that the incumbent providers might just bid at the auction to keep new entrants out. One way the Commission could avoid this problem is to implement blind bidding. Mr. Chairman and then other members of the Commission, can each of you please tell me if you have considered adopting blind bidding at this auction?

Mr. MARTIN. Yes, I have considered and I think that we should increase the use of blind bidding for this auction, over what we have done in the past.

Mr. COPPS. On balance, yes.

Mr. DINGELL. Sir?

Mr. ADELSTEIN. I am supportive of blind bidding for this auction.

Mr. DINGELL. Madam Commissioner?

Ms. TATE. I think that more information can help carriers on knowing how best to bid.

Mr. DINGELL. Thank you. Commissioner?

Mr. MCDOWELL. Yes, I have considered it.

Mr. DINGELL. Now, Chairman Martin, 1 year ago Mr. Markey, Senators Inouye, Dorgan and I wrote in concerning the Commission's treatment of a petition for forbearance filed under section 10 of the Act. This section, as you know, provides that any petition not acted upon by the Commission, within the applicable timeframe, shall be deemed granted. Now, could you give me a yes or no answer to this? Could a petition for forbearance be deemed granted even when the majority of the Commission opposes it?

Mr. MARTIN. When the majority of the Commission opposes it?

Mr. DINGELL. Yes.

Mr. MARTIN. No. In the Commission our internal processes have already provided that we would circulate an item prior to that forbearance deadline, that statutory deadline, and give the Commission an opportunity to vote on it. And if the majority of the Commission voted on it in a certain way, the Commission would have to act that way.

Mr. DINGELL. Well, if, however, Mr. Chairman, the Commission does not act upon the petition within the applicable timeframe, it is going to be deemed granted, isn't it?

Mr. MARTIN. Yes, sir, and I would say that, while I have been chairman and while I am chairman, I would always give the majority of the Commission an opportunity to vote, and we always have. The one instance in which there was a forbearance that was granted was because we were without a majority of the Commission, because we were missing Commissioner McDowell. He had not joined the Commission and/or was recused. So as a result, the Commission was tied 2–2. It wasn't that I didn't put forth an item; I did. The problem was there was no majority of the Commission, one way or another.

Mr. DINGELL. Members of the Commission, your comments, please.

Mr. COPPS. Could that happen? Yes. Should that happen? No. And I think we really need to have clarity, long-term, rather than just relying upon the instincts of one particular chairman along the line.

Mr. DINGELL. Thank you. Commissioner?

Mr. ADELSTEIN. Certainly it could happen. If the chairman decided that he was in the minority, that he would not allow it to come to a vote. We have heard that Chairman Martin would operate differently, and I very much respect and appreciate that, but we should have procedures in place that would require a vote on this up or down so that it couldn't be defeated by a minority.

Mr. DINGELL. Thank you. Madam Commissioner?

Ms. TATE. I thank Chairman Martin for his thoughtful comments. I agree that he is correct and that the circumstance that you all are both discussing was just a very unique one.

Mr. DINGELL. Commissioner?

Mr. MCDOWELL. I will also associate my comments with Chairman Martin's, as well. However, I hope, on a going-forward basis, we have a chance to vote on all forbearance petitions.

Mr. DINGELL. Thank you, ladies and gentlemen. One last question. I am concerned that new approaches at the Commission, adopting rules that would enhance consumer choice, might lead to higher costs. Is this a worthwhile apprehension or not? Mr. Chairman?

Mr. MARTIN. I think it is obviously worth being concerned about, but I think that the benefits outweigh the costs or the concerns, in allowing consumers to be able to pick and choose or being able to take their devices when they go with them and have a more open platform. I think the benefits outweigh the costs on that.

Mr. DINGELL. Members of the Commission, please.

Mr. COPPS. I think, on balance and over the long run, that consumer choice and competition will lead to lower prices.

Mr. DINGELL. Commissioner?

Mr. ADELSTEIN. I think a competitive market would ultimately result in, hopefully, lower prices for consumers.

Mr. DINGELL. Thank you. Madam Commissioner?

Ms. TATE. We all hope that there would be lower prices, but we can't control what the market will do.

Mr. DINGELL. Thank you. Commissioner?

Mr. MCDOWELL. We should always be concerned if a Commission action results in higher prices.

Mr. DINGELL. Thank you. Mr. Chairman, thank you for your kindness.

Mr. DOYLE. Thank you. The Chair now recognizes my good friend from Texas, the ranking member of the committee.

Mr. BARTON. Thank you. Thank you, Mr. Chairman. It is good to see you in the Chair. Let me start off on a positive note. Commissioner Copps had a suggestion at the end of his written testimony, that we modify the closed meeting rule so that the commissioners could, more than two of them could meet at a time, and I support that. I don't know if we need to do anything legislatively, but if we do, I will be happy to work with the majority, if it is their will. I think you guys should get together and talk about things. It could be a good thing.

I want to start off with the chairman, Mr. Martin, on this 700 MHz auction. I have got all kinds of quotes here from my staff, things you have said about how fierce the marketplace is and how intense the competition is and how the competitive marketplace is the best way to get improved results instead of some sort of a regulatory approach. And yet on this auction you have come up with this modification that puts conditions. Why shouldn't we just let Google bid? If they have got a better idea, why don't they go into the marketplace and bid their $4 billion or $5 billion or whatever it is and let them use their spectrum like they want? Why should we set some conditions on it?

Mr. MARTIN. The conditions that I proposed aren't designed to help any particular bidder, Google or anyone else. Indeed, there is no particular company that likes, necessarily, what I have proposed. Google is as upset about non-inclusion of some of the wholesale requirements as other companies are upset about the inclusion of an open handset or a device portability requirement. I think the reason I proposed that is not about any of the companies but about the consumers. In the past, although the wireless market is competitive, particularly on the voice side, the Commission has still had to impose certain rules to protect consumer interest, like the ability to take numbers from one carrier to the next.

Mr. BARTON. But I mean, why wouldn't you just let whatever entity bid and if they want to do some of these things, let them use the spectrum like they claim? I still don't see why that is a bad approach.

Mr. MARTIN. I think that I am concerned that, actually, in the current environment, there hasn't been any wireless providers who have been willing to provide that kind of option for consumers, just like there wasn't any wireless provider who allowed any consumer to take their number with them. And ultimately we had to take some intervention to make sure that consumers had the ability to take numbers with them when they changed service providers, and I think that it may require the Government to provide some kind of impetus to allow consumers to be able to take their cell phones that they have purchased with them as well. We are talking about a requirement that consumers often had to pay $400 for a device that becomes virtually useless if they try to take it to another carrier, and I think that that is not appropriate for consumers.

Mr. BARTON. There is nothing. If you have an open, unfettered auction, it doesn't prevent who wins it, if they want to make their product line so that anybody that uses their services can use any product, we don't prevent that.

Mr. MARTIN. We don't prevent that, and I am not sure that, it could very well be the incumbents, even with this open handset requirement and an incumbent wins that auction. I am not concerned about this for any particular company. I am concerned about trying to allow consumers to have the option of being able to have a more open platform where they can take their devices and they are in an unlocked nature.

Mr. BARTON. Well, you must have some concern about your conditions, because you are going to apparently set a minimum bid. And in case, if the minimum bid is not met, you are going to come back with an unfettered auction.

Mr. MARTIN. I was concerned, and I was concerned about your concerns about the impact, which is why I made sure and put a high minimum bid on there, because I was concerned about the letter that you wrote, saying that any of these kind of conditions might actually lead to lower prices.

Mr. BARTON. I am impressed that you are aware that I wrote you a letter.

Mr. MARTIN. I am always well aware.

Mr. BARTON. That is progress.

Mr. MARTIN. And I make sure that we actually set the highest—we took the highest bid that anyone was willing to pay for any of

the spectrum in the most recent AWS spectrum. And there were people that pay for different amounts of spectrum, depending on how large an area we were auctioning off. We took the highest bid possible, and we said, on that basis, if we multiplied that by the amount of spectrum auctioned off here, how much would that be? And that is the opening bid. So we took the winning bid in the last auction, and that is the starting bid for this piece of spectrum.

Mr. BARTON. Let me ask Commissioner McDowell a quick question. Do you have any concerns that by setting these conditions on this spectrum in this particular auction, that we set a precedent for future auctions?

Mr. MCDOWELL. If I understand the question correctly, certainly there is a precedent set, whatever we do in this auction. As someone said earlier, this is the most important auction of the century, so what we do here is crucial for what we do going forward. When I was first looking at this auction, I was looking at the AWS auction, perhaps, as a model where a majority of the winning bidders who walked away were small businesses or women and minority-owned businesses, and I thought that was a good way to go initially. So I certainly had concerns going forward that what we do here will have a tremendous effect.

Mr. DOYLE. The gentleman's time has expired.

Mr. BARTON. Could I ask one more? It is just kind of a yes or no. We have a bill, H.R. 608, that would require more public outreach for the DTV transition. It has been introduced by myself and Mr. Hastert and Mr. Upton. Does the Commission have a position on that, Chairman Martin? It is pretty straightforward education.

Mr. MARTIN. We certainly appreciate any additional efforts on consumer outreach, on the DTV transition, so we are supportive of that.

Mr. BARTON. Thank you. Thank you, Mr. Chairman.

Mr. DOYLE. The Chair now recognizes the gentleman from Illinois, Mr. Rush.

Mr. RUSH. Thank you, Mr. Chairman. This is a question to all the commissioners, and I want to be fairly brief because I have a number of questions. Can each of you describe, for this committee, how you believe the rules that will govern the upcoming 700 MHz auction will promote women and minority ownership? Beginning with Commissioner Adelstein.

Mr. ADELSTEIN. Yes. The most important aspect of it is the designated entity rules. I think they are a little bit tight, frankly, to make it easy for small companies to come in. They were changed in the last auction, and we should review those. One other element that would be very helpful for women and minorities, because this is going to be very, very expensive spectrum, this is beachfront property, it is going to go for a lot of money, as the chairman just said. What we might need to do is put a wholesale requirement on it so that small businesses can participate, small businesses can come in and have access to spectrum on a wholesale basis, and that would be probably the best opportunities for small business and entrepreneurs to really get a piece of this action.

Mr. RUSH. They don't currently exist?

Mr. ADELSTEIN. There is no current proposal before us about wholesale. A lot of entities have asked for it. Some of the big com-

panies want that to be an open, completely open spectrum on the 22 MHz. And if that would happen, I think it would really facilitate entry by women and minorities.

Mr. RUSH. Commissioner Copps?

Mr. COPPS. Well, the DE rules that Commissioner Adelstein mentioned, the 25-percent bidding credit and then having a diversity of market sizes, license sizes, available for people to bid on, I think all of those would help. But it is such a glaring problem and it is so needed for us to make some progress on this front.

Mr. MARTIN. I think it is important for us to both try to have a variety of geographic and spectrum sizes so that smaller bidders can participate, and we have done that. And I also think it is important that we have DE bidding credits, which we do have, up to 25 percent.

Ms. TATE. Obviously, as the only woman, I do share your concerns. We do have the bidding credits in place. I am hopeful that maybe women and minorities will be able to bid, because of the mix of sizes of licenses and sizes of geographic areas.

Mr. MCDOWELL. Again, I will also associate my comments with my distinguished colleagues. One concern I do have is, should the upper band, as it is now drafted, be deemed too encumbered for larger players to bid on, they may go down to the lower band where those smaller market sizes are and the smaller spectrum blocks are and outbid the smaller entities or minority-owned entities. So I think that is something we all need to look at.

Mr. RUSH. Are there currently any participants right now in any of the auctions? Do you have any current applications from minorities and also from women? Can we ascertain a specific number right now?

Mr. MARTIN. We can't ascertain a specific number right now, because where we are in the process, all the people haven't come forward who want to qualify to participate in the auction, so we can't do that.

Mr. RUSH. It has been suggested that if you lessen the geographical service area that carriers bid for, bid on for spectrum, this will allow smaller players and startup companies to take part in the auction. Otherwise only a handful of companies will be able to actually come up with the capital to bid on spectrum that serves too much territory. It is argued that shrinking the service area would help women and minority-owned businesses to compete. Can you comment on that?

Mr. MARTIN. Sure. I think it is important that we try to provide an opportunity for some smaller pieces of spectrum, some smaller geographic areas for smaller entities to participate but also provide some on a larger basis, because it is important for different kinds of services. Particularly trying to provide them on a larger geographic area can be important for people who are trying to come and compete on a new nationwide basis. So I think that we have got to design an auction that has a large percentage of the spectrum that is being sold on a smaller basis and a large percentage of it is being sold on a large basis. So I think it is important that we try to find an appropriate balance.

Mr. RUSH. And merger review. The FCC has been accused of "bootstrapping" and using its authority to approve the transfer of

licenses to impose other conditions, reportedly for the public good, on the merged entity. Has the Commission ever used this authority to promote women and minority ownership?

Mr. MARTIN. There have been instances in which the Commission has required divestitures. Prior to my time at the Commission, the Commission had required some divestitures that I know had gone to some women and minority companies. Certainly when Chairman Kennard was there I know that occurred. I don't recall off the top of my head the exact context of the order, whether it specifically required it in that context, which requires the divestitures, and they ended up in those hands. I don't know.

Mr. RUSH. Under your tenure?

Mr. MARTIN. No, no, I am sorry. That was under Chairman Kennard. Under our tenure we have required divestitures, but we haven't required it to any particular company.

Mr. RUSH. Commissioner Copps, do you have something?

Mr. COPPS. Yes. Under the merger standard we have authority to range rather widely across the whole spectrum of public interest considerations, and one of those is clearly diversity, and this is an area where we not only can but need to act more proactively.

Mr. RUSH. Did you have something?

Mr. ADELSTEIN. I would just add that when we look at the vast array of mergers among media companies, that media ownership by minorities is at horribly low levels, 3 percent, when a third of the country is minority, 3 percent own these licenses, and we have got to do something about it. So allowing further consolidation of the media only takes these licenses further out of reach of women and minorities, and I think we have to be very cautious about allowing any further media consolidation. And anything we do to change the rules on media ownership should ensure that we enhance and not detract the level of minority ownership in this country.

Mr. DOYLE. The gentleman's time has expired. The Chair now recognizes the gentleman from New Jersey, Mr. Ferguson.

Mr. FERGUSON. Thank you, Mr. Chairman. Thanks again to Chairman Martin and all of our commissioners for being here today. Chairman Martin, while the committee has been successful in implementing the E–911 with a class of VOIP provider that is so-called interconnected, there seems to still remain a significant gap. Today there are VOIP services being marketed at Radio Shack and Wal-Mart and other stores every day as a replacement service. These services are not interconnected, yet they offer outbound calling. They offer calls to regular everyday telephone numbers. Can you explain why these services are not required to also require 911?

Mr. MARTIN. To be a replacement service for your local telephone, you have to be able to do two things, you have to be able to call someone, and someone has to be able to call you. For that to occur, you have to be interconnected into the telephone network. So what we have said is, if it is a replacement of your local telephone, then they should be required to provide 911. But if it is only a service that does one side of that, if it only makes calls or only receives calls, then it can't be a replacement for your telephone because it only has half of those services. So we haven't required 911

services of them. The one outstanding issue that remains before the Commission is what if someone—what if a service operator tries to combine those aspects, so they are trying to sell you inbound and outbound together? We have actually got an outstanding notice on looking at shouldn't we extend 911 to those kind of service providers, because they would be combined in a way that it would be able to be a substitute. And I think that that would be a good step, and I have talked about that with the other commissioners, and I think that would be a good thing for us to do.

Mr. FERGUSON. I would encourage that. It just seems that there is a history here of treating like service alike, and we can get muddled up in some of the specifics and some of the details, but clearly, I have got a spreadsheet, right, a VOIP overview of two carriers, comparing, just for instance, Vonage and Skype, Skype, which is now an unregulated service. I mean, they both require broadband. They both can be used in multiple locations. They both can be used with traditional phones. You can have local and long distance calling. You can now have international calling on both. You can both make calls to traditional phone numbers. I mean, it goes on and on. I mean, these are like services, it seems, and it just seems a fair-minded person would say like services ought to be treated alike.

Mr. MARTIN. I completely agree. The reason why we didn't apply it at first to Skype was because they weren't offering both outbound and inbound calling. They were only offering outbound calling. So I think that when they start to offer both, we should apply the same rules to them.

Mr. FERGUSON. Yes. Well, it just seems to me that, to be fair, that would make a lot of sense. Commissioner McDowell, turning then back to the spectrum, I referenced the spectrum auction in my opening statement. What happens if the winner of the spectrum concludes that certain devices and applications just won't work on its network and that, notwithstanding, the open access requirement that has been proposed, won't the FCC, won't you all be forced to get back involved in all sorts of technical specifications on networks and devices and applications? I mean, couldn't we avoid that?

Mr. MCDOWELL. Congressman, you pointed out a very relevant issue: one of the unintended consequences of a possible encumbrance is the waiver process that comes after we have a licensee. So will licensees or winning bidders be filing waivers if they can't accommodate the rules? That is a legitimate question to ask and one of the questions that I am weighing in my deliberations.

Mr. FERGUSON. Well, I appreciated something that you had mentioned before. I, myself, am of the view that good spectrum management should allow entrepreneurs, rather than the Government, to determine how best to maximize our limited spectrum resources. Do you think that a departure, the Commission's seeming departure from this mentality, can be implemented? I mean, is this going to foster more flexible and market-oriented spectrum? It seems what I am hearing is a bit of a departure from this mentality that has been relatively consistent in the past. Is that wise at this point?

Mr. MCDOWELL. Well, another one of the questions I am asking is not only is the marketplace starting to dissolve the walled gardens, which, as I said earlier, I think is a business model that is doomed to fail, but we have the introduction of Wi-Fi enabled handsets. But we also, in the wireless industry as it currently exists, have about 40 resellers, we call them MVNOs, out there now. Does that mean a wholesale model, mandate, rather, is not required? That is something we need to continue to analyze.

Mr. FERGUSON. And as my last follow up, I mean, the Commission took a proscriptive approach when it wrote the rules to multichannel, multi-point distribution service, interactive video and data services, digital electronic message service. Each of these services failed. Don't you worry that the same fate awaits the open access regime that has been proposed?

Mr. MCDOWELL. A fair question, Congressman.

Mr. FERGUSON. Do you?

Mr. MCDOWELL. Yes, absolutely.

Mr. FERGUSON. Thank you.

Mr. DOYLE. The gentleman's time has expired. The Chair now yields to my friend from California, Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman.

Mr. DOYLE. Will the gentlelady yield for a second?

Ms. ESHOO. Certainly.

Mr. DOYLE. The Chair just wants to make an announcement that at 12:15, the House is scheduled to make six votes, so I would encourage Members—we are going to try to stay within the bounds of the clock here and see if we can't get this all in before votes are in, if possible. If not, we will come back. The gentlelady.

Ms. ESHOO. Thank you, Mr. Chairman. Nice to see you in the Chair. First to Chairman Martin. This is certainly my own observation, but I did note that you issued a press release in early June, on the Second Circuit Court of Appeals decision relative to the indecency issue, and I think you conclude your press release by suggesting that a la carte would somehow solve the situation. I don't know what that has to do with it. But my unsolicited advice is, because I looked again yesterday, you still have that press release up, and I don't really think it is becoming of an FCC chairman to have something like that, I mean, in terms of the language it contains. So that is unsolicited advice, and we will just go from there.

At a recent public hearing that you had, Mr. Chairman, on localism in Portland, ME, you stated that "establishing and maintaining a system of local broadcasting that is responsive to the unique interests and needs of individual communities is an extremely important policy goal for the Commission. Indeed, along with competition and diversity, localism is one of the three goals underlying the media ownership rules." First, I think it is terrific that you had the field hearing and I understand that you have another one coming up in September in Chicago, and I think the more you do those, the better off people are in the communities. So I would congratulate you for doing them and hope you do more beyond Chicago.

Now, we know that broadcasters are given the right to use the public airwaves that are worth billions and billions of dollars, in exchange for serving the public interest. Now the primary tool at your disposal is to enforce these obligations. If they are not en-

forced, then that obligation is not brought to bear and with that you have approval of broadcast licenses. But I think that that has really become a ministerial act. I observed that a broadcaster's license is up for renewal, isn't it like once every 8 years? That is a golden moment when that comes up. That is like essentially once in a decade, once in a decade, 10 times in a century, essentially. So what evidence does the Commission have before it to ensure that broadcasters have really fulfilled their public interest obligations? What does a broadcaster have to provide? What is your yardstick for measuring this obligation? It is very important. It is a critical obligation, and I think it is really being diminished. So how do you measure it?

Mr. MARTIN. There has been an increase in concern about how we should be measuring——

Ms. ESHOO. Well, I know there is an increase in concern. That is why I am asking you the question.

Mr. MARTIN. That is right.

Ms. ESHOO. I don't think anything is being done, most frankly, but maybe you can whet our appetite about what you plan to do.

Mr. MARTIN. Well, actually, I can tell you what I have already proposed to do, and it has been proposed before the commissioners and sitting there for a long time, that I proposed at about the same time we testified last time, that the Commission go on and require broadcasters to disclose more of what they are doing. We don't adopt, actually, minimum requirements about what they are doing on a local level for a certain amount of local news or a certain amount of local programming. So we don't have a minimum amount they have to report on their license renewal process, but we do have—I would propose that we have a whole new set of categories that they should have to do, they should have to fill in during that process.

Ms. ESHOO. Are you going to put that in front of the Commission?

Mr. MARTIN. It is in front of the Commission, and it has been for quite some time, and I am anxious——

Ms. ESHOO. But when do you plan to actually act on it?

Mr. MARTIN. I am anxious for the other commissioners to. It has been on circulation, and they can vote at any time. If they don't end up voting, at some point I will put it before a meeting, but we do have some others that we have statutory deadlines on.

Ms. ESHOO. That is good information. Commissioner Copps, do you want to comment on the quality of this yardstick by which public interest will be measured?

Mr. COPPS. Yes, I think before we can enforce public interest obligations, we need to understand what those public interest obligations are. Most of them have been frittered away since the 1980s, so there is precious little left for broadcasters to really get hold of and say this is what is expected of us and this is what we have to do if we are going to get a re-license from the Federal Communications Commission.

So I want us to disclose our exceptions in addition to them disclosing, which I think is a great idea and I am for disclosing their activities. We have to disclose what our expectations are for their activities and that is where we have failed.

Ms. ESHOO. Well, that is what I thought.

Mr. DOYLE. The gentlelady's time has expired.

Ms. ESHOO. What my question was, what is the yardstick by which the broadcasters are measured by? If you don't have that, they can say anything that they want and I think this almost once-in-a-decade exercise is—the opportunity is lost. So thank you, Mr. Chairman.

Mr. DOYLE. Thank you. The Chair now recognizes the gentleman from New York, Mr. Fossella.

Mr. FOSSELLA. Thank you, Mr. Chairman. Chairman Martin, regardless of what happens with the revenue raised, I guess you can guarantee that—you all talked about the importance of public safety—that billion dollars or so with respect to the grant program will be guaranteed, the funding will be there guaranteed?

Mr. MARTIN. Well, sure. I mean, we have said that the 22 MHz, what I proposed nationwide, has to raise at least $4.6 billion; that the overall auction has to raise at least $10 billion. If it doesn't, it gets re-auctioned without those conditions, and the reserve prices will always be over a billion. So yes, I think that that will——

Mr. FOSSELLA. And if it were not to meet the reserve price, you would have sufficient time to re-auction, and the money would be there pursuant to congressional intent?

Mr. MARTIN. Yes, we will be starting the auctions at the end of this year, the beginning of next year, so in December or January, and we are required to deposit the proceeds in the Federal Government about this time next year.

Mr. FOSSELLA. So regardless of what happens——

Mr. MARTIN. I think we would be able to end up doing the re-auction and complete that.

Mr. FOSSELLA. It has been touched upon a little bit. I guess I will ask just a fundamental question regarding the conditions placed on the auction. To what degree are consumers taxpayers or taxpayers consumers? My understanding is that the fair market value of the spectrum is upwards of about $20 billion. Is that a rough estimate or is that an accurate estimate of what the spectrum is left unencumbered?

Mr. MARTIN. I am not sure I can say that that is an accurate estimate. CBO had scored it somewhere between $10 billion and $15 billion. I believe CBO had already allocated $10.3 billion, and they had technically scored it at around $12½ billion. It was their best estimate. But you are right, some in the industry say it could go as high as $20 billion, but I think that I would probably have to say that, at this point, the best estimates would probably be CBO's.

Mr. FOSSELLA. Again, I ask the question about consumers and taxpayers. Different people can approach it and say, what is going to be best for the consumer, whoever wins the auction and obtains the spectrum, and then they put it into the marketplace. It is in the eyes of the beholder. But to what degree and how do you—I am just curious as to the mindset. How do you balance foregoing a potential half a billion dollars or a billion dollars or $1½ billion that would—nor to the benefit of taxpayers, assuming that the auction was unencumbered as opposed to this is best for consumers, so we are going to leave that billion or billion and a half on the table?

Mr. MARTIN. The Commission's primary responsibility is to manage the spectrum to make sure it is being efficiently utilized for the overall economic growth of the country, but we certainly want to make sure we get a fair return on it. But that doesn't mean we just simply maximize the amount of revenue an auction could obtain. For example, we have build-out requirements that say people have to use the spectrum we auction, because we know that when you put wireless services out, the overall economy benefits. And it would be a bad thing from a spectrum management standpoint if we sold it to people and they didn't use it. However, economists would argue and game theorists argue that actually incumbents would pay a premium to be able to buy spectrum and not use it, because that would prevent others from competing with them. So we have to balance consumer and taxpayer interest to get a fair return but not to purely maximize the return.

We also try to take the spectrum and divide it into smaller pieces. Actually dividing the spectrum into smaller pieces results in lower overall auction revenues. Every auction we have had in the past, the companies are willing to pay a premium for larger geographic sizes and larger pieces of spectrum. But we intentionally divide it up into smaller pieces, because we also want to make sure that there are opportunities for others to be able to participate. So maximizing taxpayer revenue or auction returns can't be the only goal. And indeed, Congress told us that we should balance all of these goals.

Mr. FOSSELLA. Fair enough. You raised a point. Do you think incumbents would buy this and park it somewhere?

Mr. MARTIN. Without any kind of requirements at all, yes, I would be worried about that, and indeed there have been auctions in the past where there has been some spectrum that hasn't been utilized throughout the whole geographic areas they bought, because we didn't have sufficient——

Mr. FOSSELLA. So again, getting back, and I understand your responsibilities under the law, but is there a way, has anybody done some internal analysis as to what that opportunity cost is to the Treasury, by imposing these conditions?

Mr. MARTIN. I think it is difficult to estimate what the opportunity cost is on that. I can tell you that you also have to balance this compared to the other proposals and plans that the Commission had considered and the other commissioners had supported. And I would say that actually the most—our internal economists, based upon past auctions, say that the most significant thing that would have a negative impact on the amount of money that was being raised was actually to take this 22 MHz and break it up into smaller blocks, that that would cost the taxpayers several billion dollars, based upon the returns on the AWS auction. So I think that you do have to balance this proposal with others and I think that the benefits of having 22 MHz together provide a significant financial incentive for companies to be able to bid on a larger geographic area and on large pieces of spectrum, that it would balance out some of the open access conditions. Some of the other proposals that don't have that also break the spectrum up into smaller blocks, and our economists do say that that will result in lower overall revenues, definitely.

Mr. FOSSELLA. But let me be clear. With respect to the conditions, there is no determination as to what that value lost is?

Mr. MARTIN. No. And I don't know if there is any way to give you—to quantify for you that——

Mr. FOSSELLA. Is one way just to auction it unencumbered?

Mr. MARTIN. Well, even then we wouldn't be able to quantify it, because we wouldn't be able to——

Mr. FOSSELLA. Let us compare it to what——

Mr. MARTIN. There is no way to end up comparing——

Mr. FOSSELLA. Mr. Copps——

Mr. MARTIN. We want to make sure and get, like I said, the fair return, and I think that, in the AWS auction, all of the winning bidders, if that was put on, this 62 MHz of spectrum that we are going to auction, it would result in raising about $10 billion, which we have guaranteed as a minimum threshold.

Mr. FOSSELLA. Mr. Copps, Commissioner Copps. I am sorry. You were shaking your head. Did you want to offer something?

Mr. COPPS. No, I am in agreement. I think it is hard to balance. You have to think about the long-term benefits too. The statute says encourage new services, encourage competition and efficient use of the spectrum. If those things really take off, you get new entrants and competition, and the gains to the economy would be significant.

Mr. FOSSELLA. I have some time left, but I know my colleagues would like to ask questions, so I will yield back. Thank you.

Mr. DOYLE. Thank you. The Chair now recognizes the gentlewoman from California, Ms. Harman.

Ms. HARMAN. Thank you, Mr. Chairman. I apologize to the witnesses for stepping out, but as always around here, there are conflicts every hour of the day. I gather from staff that no one has really drilled down on this brilliant idea of the public/private partnership. We did just have a conversation, or you did with Mr. Fossella, about revenues and revenues lost. But first, I want to state a proposition and see if you agree with me, and my proposition is that it is not just about money. Money is part of what we are going to get out of this, no question, but I believe that no matter how many billions of dollars we spend and how big the grants are to each region or county for their special flavor of local interoperability, we will not get to national interoperability unless we have an architecture that pulls them all together. Does anyone disagree with that?

Mr. COPPS. Amen.

Ms. HARMAN. Amen? Ah. Well, we are having a revival meeting, that is good, with Commissioner Copps. Right. Therefore it is critical, and whether the forcing mechanism is the public/private partnership or as I think someone on—I am not sure who suggested it, an all-public format or whatever it is, that we help these communities, who each have different ideas, get to national interoperability, somehow. Agreed?

Mr. MARTIN. Agreed.

Ms. HARMAN. Agreed. And that is where we get into this notion of specific protections or some list of requirements for the entity building out the public/private partnership, right?

Mr. MARTIN. That is right.

Ms. HARMAN. OK. So now my question is, if we go this route, and I favor this route, what enforcement mechanisms will there be, or should there be, to make certain that the private entity complies with the requirements? Will it be a condition of the license? Can you revoke the license? Will the conditions be written in the order? How will you do oversight? I know that Commissioner Copps said, I think it was Commissioner Copps, that there has to be ongoing oversight, and that is certainly something I would agree with, and I would think that everyone here would.

Mr. MARTIN. There would be ongoing oversight of the process, but I think, most importantly, that we do have, for example, very strict build-out requirements to make sure that this is being built out to serve those public safety entities, this piece. We have explicitly written into the license a condition of forfeiture if they fail to meet those build-out requirements. And then, if they did have to forfeit the license, the public safety entities are provided the right to purchase those assets automatically. So that is one of the, for example, one of the safeguards we have put in to make sure that this is actually going to be built out to solve the interoperability problem and that the public safety interests are protected.

Ms. HARMAN. How do we have confidence that the public safety entity, if there is this foreclosure, that is what it sounds like, will have the competence or the financial viability to be able to build out the network according to the specifications that are in the order?

Mr. MARTIN. I would say that I can't guarantee that. What I would say is that what we are trying to do is find the best alternative of the ones that are within the Commission's authority to try to solve the interoperability problem. I think what Commissioner Copps referenced and what you referenced was that the Government could also provide the funding to build out an exclusive public safety network that would be run and owned by public safety entities. And if Congress chose to do that and if the Government chose to do that, obviously that would be something that would be in the public safety's interest, and they would have the expertise, and they would own those assets. But in the absence of that option, which doesn't appear to be materializing for public safety, what we have put forth is something that I think will do the best we can within our context. But we can't address all of the issues and we have got certain safeguards to try to protect it, but I can't say that it guarantees that they would have that local know how.

Ms. HARMAN. Well, I hear you. I think Commissioner Copps wants to comment, too, and my time is running out, but I understand how you got to where you are, and I have been closely following this, as I said, with Mr. Pickering, who is going to make me into a conservative, by his terms, on this issue, and he did point out, to remind us all, that being conservative can also mean supporting open access, but this just has to work. And I know my time is over, Mr. Chairman, but could Commissioner Copps comment on what I have just said?

Mr. COPPS. I just think the public safety requirements have to be known by whoever is going to bid and win this partnership. They have to know what is going to be expected of them going in. And then, second, and I can't stress this too much, there is the im-

portant, critical, ongoing role of the FCC to make this happen and to have the power, when there is a standoff and the decision is not being made, to make the decision. Now that may entail a more proactive FCC than we have had in recent years, but this is not going to work without that kind of authority for us.

Mr. DOYLE. The gentlelady's time has expired.

Ms. HARMAN. Thank you, Mr. Chairman.

Mr. DOYLE. The Chair now recognizes the gentleman from Georgia, Mr. Deal.

Mr. DEAL. Thank you. In light of the anticipated votes, I will be brief. Mr. Chairman, you had indicated that the lab would be on target to issue a report on the white spaces by the end of this month, which I believe is a week from today. In your estimation, are they on track to complete that deadline?

Mr. MARTIN. Yes, they are. They will issue their report on the initial testing of all of those white spaces devices.

Mr. DEAL. And do you anticipate that their report will be thorough in terms of the feasibility of devices, so as not to cause interference?

Mr. MARTIN. I think it will definitely be thorough. I think that when we release the report, I am sure that both broadcasters and the companies that put forth those devices will want to go confirm them for themselves and work with our engineers. But yes, I think it will be thorough.

Mr. DEAL. And will you try to make sure that the engineers are available to those companies?

Mr. MARTIN. Oh, absolutely.

Mr. DEAL. And to our staffs, to answer any questions that may be left unresolved?

Mr. MARTIN. Absolutely.

Mr. DEAL. And then I understand you are anticipating that you would implement rules or regulations by October to follow up on this report, is that correct?

Mr. MARTIN. That is right.

Mr. DEAL. I yield back, Mr. Chairman. Thank you.

Mr. DOYLE. Thank you, Mr. Deal. The Chair now recognizes the gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Thank you, Mr. Chairman. I have got a number of concerns. Commissioner Adelstein, if I can start with you, if I may. On the 700 MHz auction, rural carriers are becoming increasingly concerned that the open access conditions on the upper band will make the lower band more attractive and possibly squeeze them out. Being from a rural area, I am concerned about that. Would you care to comment on that?

Mr. ADELSTEIN. Well, I think it is a real concern. I have always advocated a mix of licenses for rural companies, for small and midsize companies, and as a matter of fact, the priorities on this auction as it was originally proposed that there was no what are called EAs in the lower block, and we managed to get a paired EA in there that could be available for them. But in this case, what we have been presented with is the opportunity to do open access, but it has been tied to a large spectrum block, and in some senses that is somewhat frustrating. I certainly am concerned about this. We need to find a balance, and there are certainly tradeoffs when

you talk about the need for a large 22 MHz block in the upper, to facilitate the entry of a national player, with the needs of the smaller and midsized companies.

Mr. STUPAK. Well, this open access issue would also affect new entrants and minority-owned businesses that Mr. Rush spoke of?

Mr. ADELSTEIN. The open access actually could be a very helpful provision for small and midsized companies. It would allow them, if there was a wholesale component to it, to be able to buy access to that spectrum on a wholesale basis and use that in a very limited region.

Mr. STUPAK. Commissioner Copps, you mentioned the transition to digital TV. In my district they just see it as a scheme to buy more televisions. They don't see it as really necessary. So we have a great education to do in this committee, and I think the FCC has to join with us in letting people know that you really have to do a digital transition, that it is technology, it is not just to get you to buy a new TV.

Mr. COPPS. Right.

Mr. STUPAK. But let me ask you this. You were the only joint board member to dissent on the USF cap. I have concerns about the cap proposal, in that it could freeze deployment of wireless areas in parts of the country that need it, like rural areas. Can you please explain why you dissented?

Mr. COPPS. Well, for a number of reasons. Number 1, I think the decision got us off the target of comprehensive Universal Service Fund reform, and I think, with the length of time that the referrals have been pending since 2002 and 2005, respectively, we should be dealing in comprehensive proposals right now. I think this particular cap would have had the maybe unintended but damaging effect of just getting everybody fighting with everybody else, between technologies, and we really didn't need to have that. We are supposed to be looking toward comprehensive reform. I am worried that some areas and some localities would be shut off new wireless possibilites, at the same time that we are sitting here talking about the importance of wireless and 700 MHz. So there were a number of concerns that I had.

Mr. STUPAK. Thank you. Chairman Martin, I want to ask you a little about local-into-local deployment. It is proven to be mutually beneficial to satellite operators and broadcasters, but according to the latest FCC filings, EchoStar has local-into-local service in 170 television markets, while DirecTV has local-into-local service in 142, and there is a total of 210 television markets. So that leaves at least 40 markets where satellite is not carrying the local broadcast channels. Several of these markets are in my district and are not carried. Do you think the DTV transition provides an opportunity for satellite companies to deploy local-into-local, nationwide, to all television markets? Broadcasters have a date certain that you have to switch to digital television. Do you support a date certain for local-into-local rollout? And one more, if I may. Do you support making deployment of local-into-local into all media markets a condition of the Liberty Media acquisition of DirecTV?

Mr. MARTIN. I do think that it would be helpful, from a consumer perspective, for carrying the local broadcast signals by those platforms. So I have always thought that that was positive from a con-

sumer perspective and a policy perspective. But Congress actually made the determination that it is opposed to a pure must-carry regime, like was imposed upon cable. They were going to impose a regime that allowed what was called a carry one, carry all provision, where if a satellite distributor decided to carry one, it had to carry them all. And that was in part because of the more limited bandwidth that satellite has. So while from a policy perspective I think that is a good thing, I think the Commission needs to respect Congress's balance of those interests, where they determined that we wouldn't require all local-into-local, but rather have a carry one, carry all provision on a market-by-market basis and that is why the Commission has tried to——

Mr. DOYLE. The gentleman's time has expired. The Chair now recognizes the gentleman from Mississippi, Mr. Pickering.

Mr. PICKERING. Thank you, Mr. Chairman. My first question, Mr. Chairman, deals with the public/private sector partnership. Specifically, if we expect a private sector company or entity to bid and then build a system, billions of dollars at stake, and with the public safety community to have the certainty that they will have a national network in a very timely way, when we have security, safety and lives at stake and as my other colleagues have mentioned, that we have not really resolved interoperability or made much progress since both 9/11 and Katrina. So timeliness and urgency of getting this built is very important, and what I see as an important component of that is an effective dispute resolution mechanism between the private and the public partner. How do you envision that dispute resolution working in a very timely and certain way, Mr. Chairman?

Mr. MARTIN. One of the things that I think that the Commission has learned by watching some of the challenges with the re-banding processes that occurred in the 800 MHz frequencies is that the disputes between the public safety and the private entities, without an effective dispute resolution process, can actually drag on, that re-banding process. So unlike in that area where we actually send it off to a mediator to try to mediate those differences, what we are saying here is that there will be 6 months to negotiate between those public and private entities but that all of those unresolved issues will be decided affirmatively by the Commission and that the Commission must approve that public safety and private partnership and all of those unresolved issues, in order for them to get the license to end up being in this process. So that, I think, forces the Commission to act very promptly, after the 6 months, if there are any unresolved issues.

Mr. PICKERING. Do you have timetables on the Commission to resolve disputes?

Mr. MARTIN. I mean, no, but if my other commissioners have some suggestions on what they would like, I will put something in there for a guarantee when we resolve it.

Mr. PICKERING. I think it is very important to have tight timetables so that there is certainty, both to the private partner and to the public safety. And whether it is an FCC or a binding arbitration process, there has to be certainty and there has to be a very tight timetable. The second question I have, Mr. Chairman, is that we want bidders and builders, not buyers and squatters, and this

is just too valuable a spectrum to have speculation or warehousing. And so my question to you is your benchmark at 4½ years is 35 percent of the geographic area to be built out. What happens if a company does not meet that 4-year target? What is the enforcement mechanism at that point?

Mr. MARTIN. Our enforcement mechanism is slightly different for the public/private partnership piece of spectrum than in the rest of the commercial spectrum.

Mr. PICKERING. And my particular question here is on the rest of the commercial spectrum.

Mr. MARTIN. The rest of the commercial spectrum. On the rest of the commercial spectrum we do have a series of enforcement mechanisms and penalties for failing to meet those, so that, for example, the timeframe for your license and for the rest of your build-out is shortened, as one of the penalties, for example, to automatically keep saying if you fail to meet it. But we do have certain kinds of penalties, and I would just point out again that the build-out requirements in this, that we have proposed, or that I have proposed, are the strictest build-out requirements that the Commission has ever proposed in any auction.

Mr. PICKERING. I would just encourage the Commission to make sure that you have real teeth in your enforcement, so that somebody who buys with no intention of building cannot fail at 4½ years and still hold the spectrum until 7 or 8 or 10 years without ever building. So I do hope that you have a tough enforcement mechanism, whether it is a use or lose or some other mechanism, so that that spectrum can be put back out by somebody who will truly build out the broadband for all parts of the country. The next question concerns special access, Mr. Chairman. What is your timetable on addressing special access? When do you think that the analysis will be complete, and what time do you think the Commission will act upon that question?

Mr. MARTIN. The Commission just put out the notice recently. The comments and reply comments aren't in yet, but we put on an extremely tight timeframe for comments or reply comments to come in. And as soon as those comments come in, I will. I circulated an options memo to the commissioners previously on this issue, which is how we ended up in a notice situation, and I will follow that up with another options memo for the commissioners to give input, and then I will instruct the Commission staff to do it as quickly as possible after that. I think September was the timeframe that Chairman Markey had encouraged us to try to act.

Mr. PICKERING. I want to commend you on publicly stating that the full Commission will vote on the forbearance. And then, finally, I would like to just express my concerns on the possibility of a USF cap on the wireless side. And these are my concerns: 700 MHz and broadband wireless build-out is tied to USF, and you should not see the policy as separate. Mr. Chairman, could I ask for 15 seconds? Fifteen seconds. So the build-out of the 700 is tied to USF. And so with aggressive build-out requirements, we need USF for rural areas to achieve those build-out requirements. And second, I am concerned that a temporary stop gap could become permanent and take away the incentive for comprehensive reform. And the wireless sector is the more efficient lower cost, and I just don't want

to see them disadvantaged in the long term. And with that I yield back.

Mr. DOYLE. Thank you. The gentleman's time has expired. The gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. Again, I know it has been a long morning for our commissioners. Chairman Martin, you mentioned in your testimony a number of retailers that are not properly marketing analog television sets, and other companies have still been importing sets without a digital tuner. One, I am disappointed to hear this, and how widespread is this problem? And in addition to fines, has the Commission taken any other steps to respond to these problems?

Mr. MARTIN. I would say that our investigation is that the importation of televisions that don't meet our tuner requirements has been somewhat limited. That has not been as widespread a problem. We have found that it has probably been more of a widespread problem that our recent orders requiring retailers to identify televisions that have more limited capability, that retailers were less aware of and less in compliance with that rule. But it has been significant, but it has been more. The number of televisions was significant, that were coming in, but the number of companies that were in violation was relatively few. So I am more optimistic that our significant fines in that area will address that issue, and we will hopefully try to deter anybody else from trying to bring in televisions without those tuners.

Mr. GREEN. OK. So the few companies, they have been dealt with, and so we will no longer see, I guess, these televisions being imported that do not have the digital tuners?

Mr. MARTIN. We imposed significant fines, and I am hopeful of that, but we will continue to try to investigate that and act on any other complaints that we get.

Mr. GREEN. And I know you have heard it in other opening statements from members, on your outreach and how effective you believe the Commission is being in reaching our elderly, our low income and our non-English speaking households, and is there a plan by the Commission to actually target these groups to make sure they know that the digital will be required?

Mr. MARTIN. I think that our outreach to individual groups directly has been more limited, as our congressional budgetary oversight committee is aware. We have asked for funding for that directly in the past. We had not gotten it in the past, but it is in our budget, and it has been approved this year, actually even more money than we asked for. That will allow us to do the kind of direct outreach you are talking about, to particular populations that are more likely to be unaware, like the elderly, and I am more hopeful that——

Mr. GREEN. OK, thank you. Commissioner Copps, one of the problems we have in our Houston area that public safety has experienced involves not only interoperability but the current infrastructure is not reliable under extreme conditions. For example, handheld devices aren't able to penetrate smoke to communicate with one another during, for example, a refinery fire. Can you elaborate on your tests and what feedback you are getting from public safety on their needs from the 700 MHz network? Given the

characteristics of the 700 MHz, do you think it could resolve some of these issues?

Mr. COPPS. Well, I think we are in the process of trying to gather data and information like that, and we put out a notice recently, asking for better input on the ability of wireless phones to operate in buildings and some other questions too. So I think we need to better understand not only the capacities and the capabilities but the limitations of this, and I look forward to the comments on that proceeding.

Mr. GREEN. Two weeks ago the ITC ruled on a patent dispute between Broadcom and Qualcomm, essentially freezing the import of numerous handsets bound for the U.S. Verizon recently settled, agreeing to pay $6 for a handset. However, public safety is still not able to obtain these handsets. Have you looked into the matter, and do you perceive that the action threatens our public safety communications?

Mr. MARTIN. Oh, I am sorry.

Mr. GREEN. Yes.

Mr. MARTIN. The Commission has looked into that matter. We weighed in at the ITC with our concerns that the kind of ban on the importation of any of these devices could actually have a negative impact on the public interest. We weighed in there, and we subsequently weighed in at the administration with the same facts, concerns and our concern with that ban.

Mr. GREEN. OK, I appreciate it. Thank you, Mr. Chairman.

Mr. DOYLE. Thank you. Gentleman yields back. The Chair now recognizes the gentleman from California.

Mr. RADANOVICH. Thank you, Mr. Chairman, and Commissioners, to the hearing. I do have a couple questions of Commissioner Tate. Commissioner Tate, advocates of the open access conditions on the spectrum say that there has been a market failure. In your opinion, has there been a market failure in the wireless industry, and if so, what is the evidence?

Ms. TATE. I wasn't sure that the item drew that conclusion, that there was a market failure. I thought that the item specifically talked about the issue of device portability, and I am trying to be responsive, but I truly do have an open mind, and part of being here today was to hear from you all about what you do think. I have meetings all the rest of the week with commenters, since we have just received the item. So I wasn't aware that that conclusion was drawn.

Mr. RADANOVICH. All right. In its April 700 MHz order, the FCC acknowledged that the congressionally mandated competitive bidding process ensures that spectrum licenses are assigned to those who place the highest value on the resource, will be suited to put the licenses to their most efficient use. But if the FCC opposes open access conditions, it would be substituting its own judgment for that of the market via the congressionally mandated competitive bidding process. Can you tell me if that is a good idea, and if so, why?

Ms. TATE. Well, I think that as the chairman pointed out, that not only are we talking about the value of the spectrum and maximizing the value of the spectrum but whether or not value equals dollar signs. And so in some cases, it may be that we need to look

at other public policy aspects, and that has to do with consumer choice and portability of the devices. But as I said, I am still open as to where I am at the conclusion of the day and how I am going to vote.

Mr. RADANOVICH. Very good. All right, thank you to you and also to the panel of witnesses. Yield back, Mr. Chairman.

Mr. DOYLE. Thank you. Chair now recognizes the gentlelady from California, Ms. Capps.

Mrs. CAPPS. And I want to complement the vice chair, my seat mate. Nice elevation. I have a question for the three Commissioners who serve on the Task Force on Media and Childhood Obesity. Chairman Martin, I believe it is, and Commissioner Copps and Commissioner Tate. The major concession so far has been an initiative announced by the Council of Better Business Bureaus. Among 11 companies that represent two-thirds of food advertising targeted at children, these companies have committed to not advertise to children under 12 unless the food products meet a nutritional standard.

First of all, kudos to the industry for recognizing that this is a problem. My question, however, is the standard that is chosen by the companies, themselves, and whether or not this is sufficient. This is my question to each of you. Do you believe that a uniform standard would help, in this case, the children's health situation? So Commissioner Martin, Chairman Martin, to start. Brief, maybe. Brief answers from the three of you.

Mr. MARTIN. Standards are always helpful in trying to evaluate it, but I think that this has been important that these companies have been willing to do this on a voluntary basis.

Mrs. CAPPS. I agree.

Mr. MARTIN. And I also have not heard yet from all of the advocacy groups about what they think about the standard that was drawn by these companies, so I would say I need to hear from them before I could give you a final answer on it.

Mrs. CAPPS. That is good and I just want to say it is nice to give the industry first crack at it and now you are waiting, I hear, to hear back a little more from some of the advocacy groups and you are willing to entertain the possibility of standards? Depending on what they say?

Mr. MARTIN. Yes, we have certain limitations on who the companies are. R30 is actually a media company which is actually much more limited with what they were willing to agree to. But yes, within the companies that are within our purview, yes.

Mrs. CAPPS. How about you?

Mr. COPPS. Well, if you are going to have a uniform standard, I guess the first thing you have to be sure of is, is it a commitment that really reflects something meaningful. But I applaud the fact that the food companies are beginning to step up. I think it is becoming clear now that the media companies have some considerable work to do to match and hopefully even exceed that performance.

Mrs. CAPPS. So you are not opposed to having some standard come from outside the industry and the media?

Mr. COPPS. I think that is something that we could look at depending upon the range of commitments that we get from both the food industry and the media industries.

Mrs. CAPPS. OK, thank you. And Commissioner Tate.

Ms. TATE. Yes, Congresswoman. I had the opportunity to go actually tour Kellogg and they have standards that deal with, for instance, the WIC Program or with HHS standards or standards for the food that goes into public schools. So there are multiple standards that they are dealing with, and I guess I would just want us to be careful that the entities, the Federal entities, that they already work with—in many cases, they are actually using Government food standards, and so I think that that is one thing that we ought to look at before we move forward on oh, let us develop another standard for the companies.

Mrs. CAPPS. That is a good point. Another topic and a little bit of time. Chairman Martin, at the oversight hearing in March I asked you why the Commission hadn't completed a rulemaking to reinstate consumer protection, such as restrictions on slamming and the disclosure of private information, which was lost when the FCC reclassified broadband as an "information service" subject to title I rather than title II of the Telecommunications Act. At that time, the rulemaking had been languishing for about a year and a half, and now it has been about 2 years, so can you give us an update on the status of that rulemaking? And again, I want to follow up with a couple of other commissioners.

Mr. MARTIN. We have taken several important steps to address many of the issues that were first identified in that rulemaking, so we have adopted, for example, just two meetings ago, we adopted some significant consumer protections for the disabled, which was one of the issues.

Mrs. CAPPS. Yes.

Mr. MARTIN. So instead of taking it as just one rulemaking, we have taken the disparate pieces and have been trying to work on each one of them, so we did that on public safety and 911, on disabilities, and I anticipate we have already taken some steps on privacy, to extend our privacy rules. I think we will continue doing that and will complete the comprehensive—hopefully, we will be able to have had addressed all of those issues by the end of this year.

Mrs. CAPPS. Excellent. Mr. Adelstein, do you want to comment?

Mr. ADELSTEIN. I certainly hope we would. It has been 2 years since that has been pending, and we have already reclassified other services, so we are spending our time doing all these reclassifications without putting consumers first, and when we saw major privacy issues, we talked about privacy, as this committee has, and there hasn't been a comprehensive solution to the privacy issue. Truth in billing, slamming, cramming, access to persons with disabilities we have done, but we have universal service issues that also aren't dealt with. We just heard about a major discontinuance. We haven't dealt with that issue. We have got outage reporting, rate averaging, there are all these issues regarding how consumers are affected that we haven't dealt with, and I am pleased to hear the chairman say we are going to do that expeditiously.

Mr. DOYLE. The gentlelady's time has expired. As you see, we have votes on the floor, and we want to try to finish this hearing so we don't keep our commissioners here another hour.

Mrs. CAPPS. Thank you.

Mr. DOYLE. The Chair now recognizes the gentleman from Florida.

Mr. STEARNS. Thank you, Mr. Chairman. Chairman Martin, the first question I have for you is a position that you had dealing with network neutrality and trying to bring that into your position on wireless broadband and infrastructure. At the last oversight hearing you said that you opposed network neutrality conditions in the wireline context because it deterred investment in broadband infrastructure,

Mr. MARTIN. Yes.

Mr. STEARNS. But wireless broadband infrastructure is even less developed than wireline broadband infrastructure. I would think you would be more worried about chilling wireless investment with your proposed auction's conditions, which I mentioned in my opening statement earlier.

Mr. MARTIN. I am concerned about imposing network neutrality requirements on wireline infrastructure, and I would also be equally concerned about network neutrality requirements on wireless infrastructure. That is why I haven't proposed network neutrality requirements on wireless. Indeed, on the wireline infrastructure today, you can plug in a phone that you buy from the phone company or you can plug in a phone that you buy from Radio Shack or one from Best Buy and all of them work. And that works today on the wireline infrastructure, and there is no network neutrality that applies to wireline infrastructure.

Network neutrality deals with actually the selling of that capacity under a more restricted basis. What I am proposing to do on wireless is exactly what already occurs on wireline today, and that is why I agree with the statement that network neutrality should not apply to wireline, and that is why I am not proposing network neutrality applied to wireless. I couldn't be proposing network neutrality requirements on wireless, or those would be requirements that would be network neutrality on wireline and we have determined that they are not.

Mr. STEARNS. Are there any conditions that you foresee that would change dealing with wireless broadband infrastructure that might change your thought on this? I think what you are saying is that network neutrality that applied is not necessarily applicable in the same context.

Mr. MARTIN. I don't think that what we have proposed, these kind of open Carterfone type rules are network neutrality at all.

Mr. STEARNS. OK.

Mr. MARTIN. Indeed, they are not considered network neutrality in the wireline context, nor should they be considered network neutrality in the wireless.

Mr. STEARNS. OK, let me go on. I have a letter here. It has approximately 140 small and regional wireless carriers that say Chairman Martin's auction proposal will raise the spectrum costs for smaller providers. In fact, they think it, perhaps, would shut them out altogether. The reason is that larger providers will bid on

the smaller licenses which don't have conditions. I ask unanimous consent that this letter be submitted into the record, Mr. Chairman.

Mr. STEARNS. And Commissioner Tate, you have built your career on rural issues. Do you support this proposal, knowing that it possibly could hurt small and rural wireless providers?

Ms. TATE. Well, in looking at the spectrum as the plan presently before us in this item, it has the same or even a similar mix of licenses, both in terms of geographic areas and in the size of the licenses.

Mr. STEARNS. Do you support this proposal?

Ms. TATE. I am sorry, I really am trying to be responsive.

Mr. STEARNS. OK.

Ms. TATE. But I have not decided how I am going to vote.

Mr. STEARNS. This letter was sent to you on July 16, and it was addressed to yourself as well as all of them, and so my question is, I guess——

Ms. TATE. No, sir. I don't want to do anything that would harm rural areas.

Mr. STEARNS. OK.

Ms. TATE. I want broadband to go into rural areas.

Mr. STEARNS. I understand.

Ms. TATE. Right now, the item that is proposed and the way that the band plan is lined out has a generous mix of different sizes of geographic——

Mr. STEARNS. Would you say you agree with this 50 percent of the time?

Ms. TATE. I would be happy to read the letter and get back with you later today.

Mr. STEARNS. So you haven't read the letter?

Ms. TATE. I have not.

Mr. STEARNS. Even though it was addressed to you July 16?

Ms. TATE. I am sorry. I have not——

Mr. STEARNS. No, I understand. We have got a pig in a basket. Commissioner McDowell, what are your thoughts?

Mr. MCDOWELL. I share those concerns outlined in the letter. I have spoken with many small carriers from across the country, that they are concerned they might be shut out of this auction, so that is something I am carefully considering as we go forward.

Mr. STEARNS. OK. I guess the other two commissioners might want to comment on this, too? And I guess are you worried about the little guy, the 140 signatures on here or——

Mr. MARTIN. Sure, I am worried about the little providers, but I think we need to have a mix of areas of spectrum, and what we are doing in this 700 MHz auction is distributing spectrum in geographic areas that is very similar to what we have done in the past with a mix of them for small areas for some small providers to compete; midsize areas and some larger areas.

Mr. STEARNS. Mr. Chairman, we are almost out. Can I just ask the other two commissioners if they agree with what is in this letter or not?

Mr. DOYLE. Yes, yes or nos.

Mr. STEARNS. Just yes or no. Commissioner Copps.

Mr. COPPS. I can't give you a yes or no. Do we have concerns about that? Am I going to be doing my dead-level best to make sure that this auction is good for rural consumers, rural companies and rural America? Yes.

Mr. STEARNS. I think that letter raises some real concerns we have to watch out for in this, but it is difficult. We are trying to get a good mix and balance of the different license sizes.

Mr. DOYLE. The gentleman's time has expired.

Mr. STEARNS. Thank you.

Mr. DOYLE. Without objection, the Chair recognizes the gentlewoman from Tennessee.

Mrs. BLACKBURN. Thank you, Mr. Chairman, and I will be brief. I want to thank all of you for your time today, and I want to thank you for your willingness to have discussions with us as we have seen you and the issues that come out. And I am going to go right where Mr. Stearns was and follow on with this, with our small regional and rural carriers. This is terribly important to us, so let me ask the question this way, and then each of you give me a yes or no.

Isn't spectrum from these carriers and the citizens they serve more important or as important to you than giving the open access experiment to Google? So is it as important to you to give rural carriers access, the small rural and regional, as it is to have this experiment with Google? So Commissioner Adelstein, you first.

Mr. ADELSTEIN. Well, I do think they are both important, and I think we need to find the right balance between the two in the final item.

Mrs. BLACKBURN. OK.

Mr. COPPS. Yes, and I hope we have an auction that will accommodate both.

Mrs. BLACKBURN. Chairman Martin?

Mr. MARTIN. I don't agree with the premise that this is an experiment for Google, but what I will say is that rural consumers are just as important as the urban——

Mrs. BLACKBURN. OK. Commissioner Tate?

Mr. MARTIN. And all consumers being able to take devices with them is important.

Mrs. BLACKBURN. OK. Commissioner Tate?

Ms. TATE. I am very concerned about rural consumers.

Mrs. BLACKBURN. OK.

Ms. TATE. I do not know how I am going to end up voting.

Mrs. BLACKBURN. OK. Commissioner McDowell?

Mr. MCDOWELL. Yes.

Mrs. BLACKBURN. Thank you, sir. OK, Chairman Martin, you made a statement during your comment that you had to balance consumer interest and taxpayer interest, and sir, I would recommend or would offer to you that those are one and the same, and we have to be willing to say that our taxpayers deserve the maximum return from their investment in the Deficit Reduction Act. And we all know that we are looking at something that really smacks of corporate welfare for a company with a $170 billion market cap, if we are not very careful about how we approach this, and that is why I think the comments about an important experiment are of concern to many of us here.

So as you look at this, I have been so curious about Google's offer to bid up to $4.6 billion in a reserve price for the 22 MHz. That is really curious to me, because I look at it, and I go back and I look at the 10 MHz of the 3G spectrum that was given to Nextel 3 years ago, and now we have 22 MHz on the block, and this is higher quality, and it is coming available nearly 4 years following the 3G auction, and you would think that it would be worth more. At the same time, we go in and we look at the discussions around the advanced wireless service auction and the rules that were set forth there in phase I of the 4G auction process. And I would like to ask you, are you aware of any proposal during the rulemaking process for AWS that sought open access for the spectrum?

Mr. MARTIN. I am not aware of any proposal during that AWS. There might have been, but I am not aware of any.

Mrs. BLACKBURN. OK. Well, thank you. I will tell you, that concerns us that we see now you are looking at having this experiment in the open access proposals that are there, because we know that what has changed during that period of time is probably not a lot except the expansion of the wireless market to additional industry players. You are seeing increased competition in the regional and local markets and lower prices and an increase of service for consumers.

So our question becomes what makes the 700 MHz auction different from AWS, and why do potential bidders and competitors to the folks who bid on that spectrum deserve open access restrictions that are not standard industry practice today?

Mr. MARTIN. I am interested in consumers being able and deserving of the ability to have more flexibility with the telephones that they are buying, and I am concerned about the industry practices, as you called them, today, just like I think the consumers, in the end, were deserving of being able to take their telephone number with them when they switched carriers. I think that they are deserving of being able to take the telephone that they have had to buy and pay for with them as well. And so I think that I am concerned about that practice as the industry practice today. Yes, I am.

Mrs. BLACKBURN. OK, thank you very much. I will yield back, Mr. Chairman.

Mr. MARKEY [presiding]. The gentlelady's time has expired. And unfortunately there are five roll calls that are now going to be conducted in order out on the House floor, so we will have to bring this hearing to a conclusion. Before I do, though, I ask Commissioners Tate and McDowell whether or not they would support applying Carterfone protections for consumer devices in this slice of the spectrum that the chairman wants to set aside. And I don't know if you have had time to think about it in the last 3 hours. You can firm up your views. Are you still undecided on that?

Ms. TATE. Perhaps when we leave today, all the carriers will announce that they are opening all their devices and we will all be able to take them with us.

Mr. MARKEY. Right after that non-caloric hot fudge sundae is announced as well, as the new solution to dieters. Commissioner McDowell?

Mr. MCDOWELL. Throughout this whole proceeding, Mr. Chairman, I am keeping an open mind. I am still responsive to all arguments, right now, leaning against the proposal, however, on that aspect of it.

Mr. MARKEY. Well, let me just say this in conclusion. First of all, it was a great hearing, and we very much appreciate the commissioners when they come up here. You can see that there is an incredible amount of interest in everything that you do. I have been on this committee for 31 years. I remember back when I arrived here in 1976, that Carterfone was a huge issue. AT&T was still arguing how onerous a burden this would be upon them, as it was fully being implemented, that people could actually go to a phone store and buy a different color phone than black, that they could buy another kind of a device and actually plug it into the phone jack. And AT&T was making this incredible argument as to how actually potentially it could bring down the entire phone system of greater Boston or New York if the wrong kind of phone was purchased and put in any individual jack anywhere in America. And that actually was the key hearing for me that I actually announced that I was now in favor of breaking up AT&T, because it really doesn't do any good if you can win all of these Nobel prizes in basic research in Bell Labs but you can't figure out how to have some other company just plug in a phone into the same phone jack and be able to talk to their mother somewhere in the rest of the country.

And so Carterfone, to me, was the big moment, as is kind of the application of those same principles here in the wireless marketplace. When people buy one of these $500, $600, and there is no question, it is going to wind up $700, $800 devices, that they ought to be able to take it with them. I found that, in the 8th grade at the Immaculate Conception Grammar School, they explained this concept of anthropomorphism, which is applying human qualities to inanimate objects. And as we all know, this new sophisticated iPhone is now a part of people's families. It is no longer just a device. It is every single human interaction that these people have is now programmed into these devices, and it is a very expensive device, and people should not be forced to swallow the cost of it.

Similarly, back in 1993, when this committee was moving over 200 MHz of spectrum, in working with the FCC we were able to devise something that said that the first and second companies, the two incumbents, could not bid for the third, fourth, fifth and sixth license that we were creating across the country, unless they did not own a license in any one of those marketplaces. And in that way, we would have the extra competition, the third, fourth and fifth and sixth companies in every market, there would be a real pressure to innovate, a real pressure to lower prices, a real pressure to force the first two companies to move to digital from analog. They were both still analog in 1993. And guess what happened?

Once the Federal Communications Commission adopted those policies, all of a sudden, by 1995, 1996, the first two companies were announcing their digital plans, their lower price plans. No longer 50 cents a minute; now 10 cents a minute or lower. And that was because a plan was put together that would benefit consumers, benefit innovation, benefit entrepreneurs who were ready to move

and ready to make the changes. And I think you are at that same historic juncture as that Carterfone decision and that decision in 1993, 1994 to move to real competition out in the marketplace and a competition which unleashes all of this creativity that is pent up. We know it is. We know it is there. We know that what we are seeing in other countries in the world would happen here if we created the conditions for it. That is real competition.

And so to you, I think the challenge, as it always is, is to create a paranoia-inducing Darwinian competition out in the marketplace for devices, for applications, for the American consumer but also for all of those entrepreneurs across the country. And I do hope, sincerely, that you respond to the historic challenge. It has been the FCC over the years that has led the charge in opening up to the American people and its entrepreneurs all of these opportunities.

As former Chairman Barton said earlier, it is the sector which is leading the country right now, and we have a chance to make it lead the world as well. In these particular areas we are not right now, but with, I think, a little bit of flexibility on the part of the Commission and some recognition of the opportunities that would open up for entrepreneurs and for consumers across the country, then I think it would make a real difference.

So I thank you for all of your attention to these issues. And without objection, a letter from Mr. Dingell and myself and the Commission's response will be entered into the hearing record regarding franchising issues, at this point in the record.

Again, with thanks of the subcommittee and an invitation for you to return in the fall to discuss, in a follow-up hearing, all of these issues that we have been discussing today and especially to you, Mr. Chairman, given the circumstances under which you are testifying today. With the thanks of this committee, this hearing is adjourned. Thank you.

[Whereupon, at 1:10 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

John M. Lawson
President & Chief Executive Officer

July 23, 2007

The Honorable Eliot Engel (NY-17)
U.S. House of Representatives
2161 Rayburn House Office Building
Washington, DC 20515

Dear Congressman Engel:

On behalf of the Association of Public Television Stations (APTS) and local Public Television stations across the United States, I am writing to convey our enthusiastic endorsement of your legislation, H.R. 2566 – the National Digital Television Consumer Education Act.

Public Television embraced digital broadcasting early due to the many benefits that can be gained from digital television, including improved education services, distance learning and even an improved public alert and warning system to help Americans in the wake of disaster.

The transition to digital television, however, is not guaranteed to go smoothly. APTS has actively sought to increase consumer awareness in advance of the transition to digital television and the federally mandated switch-off of analog broadcasting on February 17, 2009.

A recent APTS survey found that an estimated 61% of households have no idea about the digital transition. Of these 22 million American households that rely upon free, over-the-air television, most, if not all, will move slowly to adopt digital TV sets or subscribe to cable services.

Consumers need to be aware that digital over-the-air television will continue to be free, will offer more channels and will give a better picture even on an older set—with a converter box.

The National Digital Television Consumer Education Act is a comprehensive approach to educating the American public about the transition to digital television, and includes a number of provisions to increase consumer awareness of the coming "hard date" of February 17, 2009 for the beginning of digital-only broadcasting. It creates a DTV Transition Federal Advisory Committee to provide leadership across industries, non-profits and government for the transition. The bill also authorizes $20 million in funds to reach over-the-air viewers with information about the transition.

We applaud your leadership in taking a comprehensive approach to consumer education. It will greatly increase the odds that the DTV transition is successful, and we are particularly pleased that the National Digital Television Consumer Education Act would provide crucial funds to support a consumer education campaign. This funding will help to reach those groups of American households most affected by the transition from analog to digital.

Congressman Engel
July 23, 2007
Page Two

APTS and Public Television looks forward to working with you and other Members of Congress in advance of the digital television transition on the National Digital Consumer Education Act. Thank you again for your interest in this important consumer protection issue.

Sincerely,

John M. Lawson
President and CEO
Association of Public Television Stations (APTS)

CTIA
The Wireless Association®

Expanding the Wireless Frontier

July 16, 2007

The Honorable Kevin J. Martin, Chairman
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert M. McDowell
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: WT Docket Nos. 06-150, 06-169 and 96-86; PS Docket No. 06-229

Dear Mr. Chairman and Commissioners:

We have learned through recent media accounts that the Commission's proposed service rules seek to impose an "open access" requirement on 22 MHz of the Upper 700 MHz band spectrum. On behalf of the approximately 139 undersigned small and regional operators and organizations, we write to urge you to reject an "open access" mandate in this spectrum. The FCC should refrain from imposing novel and untested open access conditions, which favor a single entity, on the 700 MHz spectrum critically needed by small and regional carriers to increase coverage and services.

The proposed open access mandate in the 700 MHz band would significantly hinder small carrier participation in the 700 MHz auction and in many cases foreclose their ability to deploy this spectrum in small and rural markets. The open access and public safety requirements on the licenses in the Upper 700 MHz band will force large carriers, deterred by open access requirements, to pursue licenses in the Lower 700 MHz band. As a result, both large and small carriers will be bidding on the same 24 MHz of spectrum in the lower 700 MHz band. This is particularly troubling because the spectrum in the Lower 700 MHz band uses smaller license areas intended to benefit small and regional carriers. Although many smaller licenses may initially cost more, large carriers will likely choose to bid on the many smaller licenses rather than accept larger, encumbered licenses. The end result would be fewer small and regional license winners in the 700 MHz auction.

Ultimately, we believe that the undersigned small carriers and the millions of consumers we serve will be the net losers from an open access requirement in the Upper 700 MHz band. The proposed open access requirements trade the benefits of rural deployment by small and regional licensees, and their proven track record of providing service to their customers, for – at best – speculative gains of an open access network.

In sum, we fear that encumbering the Upper 700 MHz licenses with onerous conditions will result in small and regional carriers having little chance of securing licenses to deliver innovative 700 MHz wireless services to their subscribers.

Pursuant to Section 1.1206 of the Commission's Rules, this letter is being electronically filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Companies:	**Corporate Headquarters:**
Alaska Communications Systems, Inc.	Anchorage, AK
Blooston Rural Carriers	
All West Communications, Inc.	Kamas, UT
BEK Communications Cooperative	Steele, ND
Big Bend Telephone Company	Alpine, TX
Cannon Valley Communications, Inc.	Bricelyn, MT
CC Communications	Fallon, NV
Chibardun Telephone Cooperative, Inc.	Dallas, WI
Clear Lake Independent Telephone Company	Clear Lake, IA
Command Connect, LLC	Sulphur, LA
Communications 1 Network	Kanawha, IA
Eastern Colorado Wireless, LLC	Wiggins, CO
FMTC Wireless, Inc.	Nora Springs, IA
Hancock Rural Telephone Corp. d/b/a Hancock Telecom	Maxwell, IN
Harrisonville Telephone Company	Waterloo, IA
Haviland Telephone Company, Inc.	Haviland, IN
Heart of Iowa Communications	Union, IA
Interstate Telecommunications Cooperative	Clear Lake, SD
Kennebec Telephone Company, Inc.	Kennebec, SD
Ligtel Communications, Inc.	Ligonier, IN
Manti Telephone Company	Manti, UT
Mid-Rivers Telephone Cooperative, Inc.	Glendive, MT
Midstate Communications, Inc.	Kimball, SD
Nucla-Naturita Telephone Company	Nucla, CO
Ponderosa Telephone Company	O'Neals, CA
Red River Rural Telephone Association, Inc.	Abercrombie, ND
Santel Communications Cooperative	Woonsocket, SD
Smithville Telephone Company	Ellettsville, IN
South Slope Cooperative Communications Co.	North Liberty, IA
Venture Communications Cooperative	Highmore, SD
Webster Calhoun Cooperative Telephone Association	Gowrie, IA
Yadkin Valley Telephone Membership Corp.	Yadkinville, NC
Cincinnati Bell Wireless	Cincinnati, OH
CTIA – The Wireless Association®	Washington, DC

East Kentucky Network, LLC d/b/a Appalachian Wireless	Prestonburg, KY
General Communication, Inc.	Anchorage, AK
Mohave Wireless	Kingman, AZ
NTELOS, Inc.	Waynesboro, VA
Rural Cellular Association, on behalf of its approximately 100 small and regional wireless carrier members, available at http://americanroamer.com/rca/rca_members.html	
U.S. Cellular Corporation	Chicago, IL
Westlink Communications, Inc.	Ulysses, KS

HENRY A. WAXMAN, CALIFORNIA
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RICK BOUCHER, VIRGINIA
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ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515–6115

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September 4, 2007

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Mr. Chairman:

Thank you for appearing before the Subcommittee on Telecommunications and the Internet on Tuesday, July 24, 2007, at the hearing entitled "Oversight of the Federal Communications Commission - Part 2." We appreciate the time and effort you gave as a witness before the Subcommittee.

Under the Rules of the Committee on Energy and Commerce, the hearing record remains open to permit Members to submit additional questions to the witnesses. Attached are questions directed to you from certain Members of the Committee. In preparing your answers to these questions, please address your response to the Members who have submitted the questions and include the text of the Member's question along with your response. Please begin the responses to each Member on a new page.

To facilitate the printing of the hearing record, your responses to these questions should be received no later than the close of business **Wednesday, September 12, 2007**. Your written responses should be delivered to **316 Ford House Office Building** and faxed to **202-225-5288** to the attention of Philip Murphy, Staff Assistant. An electronic version of your response should also be sent by e-mail to Mr. Philip Murphy at **phil.murphy@mail.house.gov** in a single Word formatted document.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Amy Levine at (202) 226-2424.

Sincerely,

JOHN D. DINGELL
CHAIRMAN

Attachment

cc: The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Edward J. Markey, Chairman
Subcommittee on Telecommunications and the Internet

The Honorable Fred Upton, Ranking Member
Subcommittee on Telecommunications and the Internet

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Dingell:

Please find enclosed my responses to the post-hearing questions submitted by the Subcommittee on Telecommunications and the Internet.

Please contact me if I can be of any further assistance.

Sincerely,

Kevin J. Martin
Chairman

cc: The Honorable Edward J. Markey, Chairman
Subcommittee on Telecommunications and the Internet

The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Fred Upton, Ranking Member
Subcommittee on Telecommunications and the Internet

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

HEARING

ON THE

FEDERAL COMMUNICATIONS COMMISSION

Questions for the Record

for

Federal Communications Commission
Chairman Kevin Martin

July 24, 2007

Please return to the Subcommittee on Telecommunications and the Internet by
September 12, 2007

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by The Honorable John D. Dingell

1. *Set-Top Box Waivers*

The statute governing the Federal Communications Commission's (FCC) ability to issue waivers from the set-top box integration ban states that the Commission must issue a decision within 90 days from the time the waiver request is filed. 47 U.S.C. 549(c).

a. **Please list the Commission's response time for each set-top box waiver request it has considered.**

Answer:

Petitioners submitted waiver requests variously under 47 U.S.C. § 549(c), the Commission's *2005 Deferral Order*, Section 706 of the Telecommunications Act of 1996, and the general waiver provisions set forth in Sections 1.3 and 76.7 of the Commission's rules. Accordingly, we analyzed the waiver requests pursuant to the waiver standards annunciated in Section 629(c) as well as under the general waiver provisions found in Sections 1.3 and 76.7 of the Commission's rules.

Section 629(c), provides that the Commission shall "grant" a request for waiver of the integration ban within 90 days of filing if the request makes "an appropriate showing" that such waiver is necessary. We determined that we could not grant any of the waiver requests filed pursuant to 47 U.S.C. § 549(c). Specifically, 47 U.S.C. § 549(c) of the Communications Act explicitly states that the Commission shall waive its set-top box rules under this provision when "such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products." Where digital cable services are already being provided by petitioners, waivers could hardly be "necessary" for the "introduction" of such services. Notably, the 90-day time limit in Section 629(c) does not apply to our general public interest waiver review. *See* Attachment A.

b. **Please list all pending set-top box waiver requests and how long each has been pending.**

Answer:

See Attachment B.

c. **The Commission has put some, but not all, set-top box waiver requests out for public comment. Please explain the Commission's rationale and the Commission's process for deciding which waiver requests were put out for comment and which were not.**

Answer:

As a general matter, the Media Bureau has placed set-top box waiver requests on Public Notice to solicit public comment. However, neither the Communications Act nor our rules requires that we place the waiver requests on Public Notice.

All but five petitions were put out for public comment. The set-top box waiver requests that were not placed on Public Notice raised issues essentially identical to issues in waiver requests that we had previously placed on Public Notice and on which the Media Bureau had issued waiver orders, and were filed in close proximity to the July 1, 2007 deadline.

Because we had already received comment on similar requests, we believe that we had sufficient input from the public to aid in making our decisions. An additional opportunity for public comment would have resulted in substantial delay without any significant benefit to our decision making process. At any rate, of the pending waiver requests, all 12 have been put out for public comment. *See* Attachment B.

2. ***Set-Top Box Waivers***

The statute states that the Commission may only grant a waiver request where the waiver is needed "to assist the development or introduction of a new or improved multichannel video programming or other service." 47 U.S.C. 549(c).

a. **In some cases, the Commission found that even though a waiver request failed the statutory requirement, the Commission could nonetheless grant a waiver pursuant to 1.3 and 76.7 of its rules, based on the provider's promise to migrate to an all-digital network by a date certain. Please explain why the Commission believes that its**

regulations empower it to act where the statute clearly defines Congressional intent and the scope of the Commission's authority.

Answer:

Petitioners submitted waiver requests variously under 47 U.S.C. § 549(c), the Commission's *2005 Deferral Order*, Section 706 of the Telecommunications Act of 1996, and the general waiver provisions set forth in Sections 1.3 and 76.7 of the Commission's rules. Accordingly, we analyzed the waiver requests pursuant to the waiver standards annunciated in Section 629(c) as well as under the general waiver provisions found in Sections 1.3 and 76.7 of the Commission's rules.

We determined that we could not grant any of the waiver requests filed pursuant to 47 U.S.C. § 549(c). Specifically, 47 U.S.C. § 549(c) of the Communications Act explicitly states that the Commission shall waive its set-top box rules under this provision when "such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products." Where digital cable services are already being provided by petitioners, waivers could hardly be "necessary" for the "introduction" of such services.

Waivers for low-cost, limited capability set-top boxes were also evaluated under the waiver policy articulated in the Commission's *2005 Deferral Order*. The Commission found that devices with two-way capability (such as the Motorola DCT-700) did not meet the *2005 Deferral Order*'s low-cost, limited capability standard because the limited capability devices that the Commission contemplated were devices whose functionality is limited to making digital cable signals available on analog sets. The full Commission recently affirmed the Media Bureau's decision in denying such relief to Comcast Corporation.

The Commission also has the authority to waive its rules for good cause or when doing so is found to be in the public interest. Indeed, the Commission is obligated to give a "hard look" to requests for waiver of any Commission rule to determine whether application of the rule in particular circumstances would not serve the public interest.[1] This obligation is reflected in Sections 1.3 and 76.7 of the Commission's Rules. Under those provisions, an MVPD can seek a waiver of the integration ban by demonstrating "good cause."[2] Our analysis of waiver requests pursuant to the "good cause" standard is an inherently individualized

[1] *See Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972, *cert. denied*, 409 U.S. 1027 (1972).

[2] 47 C.F.R. §§ 1.3, 76.7.

assessment of the facts presented in each case. Nearly all of the waiver requests we received sought waivers pursuant to the Commission's general waiver authority in Sections 1.3.and 76.7 of our rules in addition to the waiver authority in 47 U.S. C. § 549(c).

b. Several providers who employ the same set-top box (e.g., the DCT-700 set-top boxes) applied for waivers. The Commission granted waivers to some of those providers, and denied waiver requests to others that employ the same set-top box. If the same box was at issue, what was the Commission's rationale for granting a waiver to some providers and not to others?

Answer:

The Commission has treated set-top box waiver requests in a consistent fashion. Multichannel video programming distributors ("MVPDs") have been on notice for several years that the integration ban was going into effect and that they would be expected to comply with the rule. Numerous MVPDs asserted that waiver of the integration ban was appropriate for a variety of reasons, including financial hardship, devastation from typhoons, and an early commitment to deploy non-integrated set-top boxes. Based on the specific facts and circumstances of each waiver request, the Commission determined that some MVPDs met their burden while others did not. Each decision reflects the distinct facts presented by each waiver request and demonstrates a careful weighing of the various public interest goals discussed above.

For example, some applicants committed to operate all-digital networks no later than February 17, 2009 and we allowed them to continue to deploy the DCT-700 and other integrated two-way devices pursuant to Sections 1.3 and 76.7 of the Commission's rules. The Commission concluded that all-digital networks produce clear, non-speculative benefits, such as giving providers the ability to provide additional high definition content (which may facilitate the DTV transition by creating greater incentives for its subscribers to acquire digital television sets) and the ability to reclaim a considerable amount of spectrum within a clearly defined timeframe (which should enable providers to offer consumers advanced telecommunication capabilities). The Commission determined that, on balance, these benefits warrant limited waivers of the integration ban. In contrast, providers who did not receive a waiver did not present any compelling countervailing public interest benefits, such as operation of an all-digital network that outweighed the public interest harm from waiving the integration ban. Those petitioners were invited to refile and demonstrate such public interest benefits. We have consistently applied this precedent to small, rural cable television operators a well as larger cable operators.

3. *Video Relay Services*

a. **In May 2007, Hands on Video Relay Services, Inc., and others filed a petition for declaratory ruling concerning the provision of video relay service by Sorenson Communications, Inc. ("Sorenson"). The petitioners have asked the Commission to determine that Sorenson's requirement that its video interpreters agree to a restrictive covenant that prohibits them from working for any competing video relay service for one year after termination of their employment is contrary to the public interest. Please advise us of the status of this petition.**

Answer:

On August 3, 2007, the Commission placed the petition for declaratory ruling on public notice for comment. Initial comments were due on September 4th. In response, the Commission received 95 individual consumer comments in support of the petition, and one individual consumer comment opposing the petition. The Commission also received comment from five other groups. Sign Language Associates (SLA), National Association of the Deaf (NAD), Telecommunications for the Deaf, Inc., et al. (TDI), and AT&T each filed in support of the petition. Sorenson Communications, Inc. filed comments opposing the petition.

The reply comment period closes on September 19th. The Commission will work to resolve the matter as expeditiously as possible once the record has closed.

4. *White Spaces Devices*

The Commission's Office of Engineering and Technology ("OET") recently conducted tests of two prototype wireless devices designed to operate in the so-called television band "white spaces." OET's report indicates that one of the devices was not able to detect the presence of digital television broadcast and wireless microphone signals reliably (the device's manufacturer has since stated that the device was broken and therefore operating improperly). The Commission also found that the second device performed better than the first but was nonetheless not ready to be certified for commercial use because the device had no transmitting function. The devices' manufacturers have stated that they intend to submit additional devices to OET in the future in the hopes that the Commission will certify the devices for deployment.

As you know, one of the top priorities of Congress and the Commission is ensuring that the DTV transition is successful. Many consumers will rely on over-the-air digital broadcasts, whether through new televisions or through converter boxes. It is imperative that consumers are confident that their televisions will work. If the FCC permits unlicensed devices to operate in the "white spaces," and these devices cause unacceptable levels of harmful interference, consumers will not know what is causing the interference and will be unable to seek any kind of recourse from the manufacturer, broadcaster, or wireless device owner. For this reason, the FCC has little room for error on this issue.

a. Is the FCC committed to ensuring that it will only certify unlicensed wireless devices that have been proven, through both lab and significant and relevant field testing, not to cause unacceptable levels of harmful interference to over-the-air broadcast signals?

Answer:

As we approach the digital transition, the Commission should keep in mind that one of the top priorities of Congress and the Commission is ensuring that the DTV transition is successful. Any rules the Commission establishes to provide for the operation of unlicensed devices in the TV bands must protect against harmful interference to the authorized broadcast services that already operate in this spectrum. These services include full power TV stations, low power TV stations, and wireless microphones. The Commission has been proceeding and will continue to proceed in a thorough and deliberate manner with respect to this proceeding. The Commission is developing an extensive technical record through our pending rule making. Our Laboratory has performed initial tests (*i.e.*, both laboratory testing and field testing) of several prototype TV band devices to evaluate the interference potential. We have received comments on the tests and we are considering next steps. In the meantime, we are continuing our dialogue with all of the interested parties and additional technical data and analyses are continuing to be submitted into the record. I can assure you that we will thoroughly consider all of the engineering data, test results (*i.e.*, both laboratory testing and field testing), and responses before adopting final rules.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by The Honorable Frank Pallone, Jr.

1. ***Number Portability***

Last week the Senate Commerce Committee passed legislation to establish number portability performance standards that, among other things, would require the FCC to impose "expeditious time frames" for porting of wire-line telephone numbers for new entrants such as VoIP. While it is not clear to me whether Congress needs to grant additional authority to the Commission in this regard, I do know that the current practices by some of the voice service providers are hampering the ability of new entrants to enter the market.

Americans deserve the choice for competitive voice service and number portability is essential to competition. The FCC's rules also permit carriers to insist on large volumes of data in order to process a port when only a few bits of information is necessary.

a. **How does the Commission expect to shorten the porting intervals for simple ports and streamline the porting process? Would it make sense to limit the fields needed to port a number similar to the wireless process? Additionally, it's my understanding the Commission has the authority but has been slow to act. Is there any new authority the Commission needs to speed up these porting times so customers can get the full benefit of competition without giving up their number?**

Answer:

The Commission has historically relied on the work of the North American Numbering Council (NANC), a Federal Advisory Committee comprised of industry members, including wireline and wireless carriers, to create the standards governing porting processes. The NANC developed industry recommendations regarding a number of aspects of the wireline porting process, including adopting a four-business-day porting interval for wireline-to-wireline simple ports, which were incorporated into the Commission's regulations. The NANC also has been evaluating possible porting processes to govern intermodal ports between wireline and wireless carriers, but thus far has not achieved industry consensus for a specific recommendation.

2. *Set-Top Box Integration Waivers*

Eleven years ago Congress mandated a ban on integrated security in set-top cable boxes, instead requiring security cards, which can be mailed to customers for insertion into their cable boxes. The intent was to provide consumers with a competitive market enabling consumers to purchase their own set-top boxes from electronic retailers and take them to any provider in the country.

Following the latest deadline on July 1, 2007, the Commission granted and denied certain waiver applications for the integration ban. In those proceedings, waiver requests were granted based on promises to go "all digital" by February 2009. At the same time you denied the waiver requests of cable operators who want to use low cost digital set top boxes to also help consumers transition to digital.

I am troubled by the policies the Commission has set forth with these latest decisions. The Commission has yet to fully implement the integration ban and here we are eleven years later and we have no competitive market. It seems quite unfair to be granting waivers to some of the industry but not the others, all in the guise of the DTV transition.

a. **Can the Chairman explain why there doesn't seem to be parity in these latest decisions? More so, what does the digital transition have to do with the statute in question? Please explain.**

Answer:

The Commission has treated set-top box waiver requests in a consistent fashion. Multichannel video programming distributors ("MVPDs") have been on notice for several years that the integration ban was going into effect and that they would be expected to comply with the rule. Numerous MVPDs asserted that waiver of the integration ban was appropriate for a variety of reasons, including financial hardship, devastation from typhoons, and an early commitment to deploy non-integrated set-top boxes. Based on the specific facts and circumstances of each waiver request, the Commission determined that some MVPDs met their burden while others did not. Each decision reflects the distinct facts presented by each waiver request and demonstrates a careful weighing of the various public interest goals discussed above.

For example, some applicants committed to operate all-digital networks no later than February 17, 2009 and we allowed them to continue to deploy the DCT-700 and other integrated two-way devices pursuant to Sections 1.3 and 76.7 of the Commission's rules. The Commission concluded that

all-digital networks produce clear, non-speculative benefits, such as giving providers the ability to provide additional high definition content (which may facilitate the DTV transition by creating greater incentives for its subscribers to acquire digital television sets) and the ability to reclaim a considerable amount of spectrum within a clearly defined timeframe (which should enable providers to offer consumers advanced telecommunication capabilities). The Commission determined that, on balance, these benefits warrant limited waivers of the integration ban. In contrast, providers who did not receive a waiver did not present any compelling countervailing public interest benefits, such as operation of an all-digital network that outweighed the public interest harm from waiving the integration ban. Those petitioners were invited to refile and demonstrate such public interest benefits. We have consistently applied this precedent to small, rural cable television operators a well as larger cable operators.

Questions for the Record for Federal Communications Commission
Chairman Kevin Martin
Submitted by The Honorable Hilda L. Solis

1. ***Digital Television (DTV) Transition***

   a. **I am concerned that the consumers who will be most impacted by the DTV transition will not receive the information they need before the 2009 deadline. Outreach to over-the-air consumers, who are disproportionately Spanish-speaking and low-income, will fall to the government. Even though there is DTV information on the FCC website in English and Spanish, only 32% of Latinos who speak Spanish as their first language use the internet on a regular basis.**

   b. **What other methods are you developing to directly reach the communities most affected, such as posting flyers in bodegas, running PSAs on Spanish-language radio and television, or buying ads in Spanish-language newspaper?**

   Answer:

   I share your concern that consumers who will be most impacted by the DTV transition receive the information they need well before the transition is complete on February 17, 2009. In all our consumer education and outreach activities, we are placing particular emphasis on informing groups that might not otherwise learn about the transition, including, non-English speaking consumers, minority communities, senior citizens, individuals with disabilities, low-income individuals, and people living in tribal and rural areas.

   Indeed, as you point out, only 32% of Latinos who speak Spanish as their first language use the Internet on a regular basis. Although our specially created Internet Website, www.DTV.gov, remains an important component of our outreach on the DTV transition, we recognize, as you do, that we must undertake a wide range of activities in order to inform and assist consumers with the transition, especially the vulnerable groups that I listed above.

   To that end, we are engaging in the following activities to directly reach Spanish-speaking communities:

- Working closely with organizations representing the Spanish-speaking population. For example, in July of this year, we participated in, and exhibited at the annual conference for the National Council of La Raza (NCLR), with attendees stopping by our exhibit to receive DTV information and ask questions.

- Working with the Miami/Dade county office of consumer affairs, we have set up a network for distribution of our DTV materials to their high Spanish-speaking population. With this as a model, we are planning similar partnerships with other counties that have high Spanish-speaking populations.

- Working closely with Spanish media outlets, most notably Univision with the goal of alerting their millions of viewers of the upcoming transition.

- Attending the national convention of the National Hispanic Chamber of Commerce this month and will be distributing several hundred DTV Spanish language packets. The Chamber will be represented on a panel at our DTV workshop September 26th.

- Working with the Congressional Hispanic Caucus and providing input and materials for their annual policy summit, October 1st.

- Over the next year, participating in national conventions for the League of Latin American Citizens (LULAC), National Hispanic Leadership Council, the Hispanic Chamber of Commerce, and the National Association of Latino Elected and Appointed Officials.

- Added an option to our toll-free consumer line for consumers to request a packet of information in either English or Spanish.

With additional funding, we expect to increase our participation in events with a high percentage of Spanish speaking attendees. We are planning to contract with information distribution services to target Spanish-speaking consumers through retail stores and other alternative outlets. This would include, for example, the placement of easy to understand DTV transition materials in local grocery stores (or bodegas), community centers and other public locations that Spanish-speaking consumers are likely to visit.

c. **I know that the Commission is providing information about the DTV transition in both English and Spanish. I have concerns about whether the material was developed to be consistent and reflect Spanish idioms and cultural differences.**

For example, it has come to my attention that NTIA describes the digital converter boxes as '*un conversor.*' The FCC uses '*el decodificador de la seña digital a la analogical.*' Can you commit to working together to develop consistent translations for the DTV transition?

Answer:

I appreciate your concerns about whether the DTV materials we are preparing in both English and Spanish are consistent and reflect Spanish idioms and cultural differences. The Commission has been communicating with NTIA and our DTV Coalition partners regarding the specific example you cited involving inconsistent Spanish-language descriptions for digital to analog converter boxes.

Specifically, the FCC has changed all converter box references in Spanish to "caja convertidora" to be consistent with the DTV Coalition, the NAB and other groups, including the National Hispanic Media Coalition. In working together to develop a consistent translation of digital converter boxes, we all determined that the term "caja convertidora" was the best way to translate "converter box" into Spanish. We also are working with them to identify and correct any other possible inconsistencies that might generate confusion or uncertainty among Spanish-speaking consumers about the steps they may need to take to prepare for the DTV transition.

I can assure you that we are committed to working with NTIA, the DTV Coalition and other stake holders to promote consistent, effective messages about the DTV transition.

2. ***Forbearance Petitions***

a. **A number of concerns have been raised about the forbearance petition process at the FCC. When a petition is deemed granted because the Commissioner failed to act, we must examine that potentially broken process, regardless of the merits of any particular forbearance petition. Do you think changes need to be made to the forbearance petition process, and if so, what changes would you propose?**

Answer:

The Commission takes very seriously its obligation to faithfully implement the Communications Act of 1934, as amended, including the forbearance provisions codified in section 10 of the Act. As you know, section 10 establishes a process by which forbearance petitions "shall be deemed granted if the Commission does not deny the petition" within a maximum of 15 months. As with all statutory deadlines, it has been the Commission's practice to circulate to all of the Commissioners draft orders addressing forbearance petitions no later than 21 days prior to the statutory deadline and to remind them of the statutory deadline at that time. In addition, Commissioners are regularly provided with lists of upcoming statutory deadlines for forbearance petitions. I have continued to follow that policy.

Pursuant to this process, while I have been Chairman, every forbearance petition has been preceded by an up-or-down vote.

Since I have been Chairman, only one forbearance petition has been deemed granted by operation of law. That petition, *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket No. 04-440* (Verizon Forbearance Petition), was "deemed granted" after the Commission, by a recorded 2-2 vote, failed to adopt a draft order that would have granted the petition in part and denied it in part.

I do not believe that there is presently a need for a procedural rule requiring an up-or-down vote on all forbearance petitions, as there has never been a grant or denial of a forbearance petition during my tenure as Chairman in the absence of such a vote. The Commission's current process for handling forbearance petitions is working well, and the circumstances surrounding the Verizon Forbearance Petition were unique, given that only four Commissioners were available to vote. Moreover,

such a procedural rule would not have made a difference with respect to the Verizon Forbearance Petition since an up-or-down vote was taken in that case.

Attachment A

COMMISSION'S RESPONSE TIME FOR EACH SET-TOP BOX WAIVER REQUEST IT HAS CONSIDERED

Comcast – 266 days from receipt (238 days from Public Notice ("PN")) for Bureau-level order.

Verizon – 325 days from receipt (304 days from PN)

National Cable & Telecommunications Association – 317 days from receipt (241 days from PN)

BendBroadband – 98 days from receipt (71 days from PN)

Cablevision – 44 days from receipt (23 days from PN)

Charter – 294 days from receipt (248 days from PN)

GCI Cable – 77 days from receipt (52 days from PN)

Millennium Telecom, LLC d/b/a One Source Communications – 65 days from receipt (52 days from PN)

Armstrong – 235 days from receipt (137 days from PN)

RCN – 248 days from receipt (161 days from PN)

Sunflower Broadband – 221 days from receipt (137 days from PN)

Cequel Communications LLC d/b/a Suddenlink Communications – 206 days from receipt (137 days from PN)

City of San Bruno d/b/a San Bruno Municipal Cable – 197 days from receipt (137 days from PN)

Bresnan Communications, LLC – 193 days from receipt (137 days from PN)

NPG Cable – 172 days from receipt (137 days from PN)

Orange Broadband Operating Company, LLC and Carolina Broadband, LLC – 171 days from receipt (137 days from PN)

Atlantic Broadband Finance, LLC – 171 days from receipt (137 days from PN)

Liberty Cablevision of Puerto Rico, Ltd. – 135 days from receipt (122 days from PN)

Qwest – 137 days from receipt (77 days from PN)

JetBroadband VA, LLC & JetBroadband WV, LLC – 159 days from receipt (132 days from PN)

WideOpenWest Finance, LLC – 145 days from receipt (101 days from PN)

Attachment A

Kalona Cooperative Telephone Co. – 120 days from receipt (77 days from PN)

Mahaska Communication Group – 116 days from receipt (77 days from PN)

Winnebago Telephone – 116 days from receipt (77 days from PN)

Heart of Iowa Communications Cooperative – 114 days from receipt (77 days from PN)

CenturyTel Inc. – 112 days from receipt (77 days from PN)

Dumont Telephone Co. – 112 days from receipt (77 days from PN)

South Slope Telephone Cooperative – 112 days from receipt (77 days from PN)

Cable & Communications Corporation and Mid-Rivers Telephone Cooperative, Inc. – 109 days from receipt (77 days from PN)

Farmers' and Business Mens' Telephone – 109 days from receipt (77 days from PN)

Radcliffe Telephone Company – 109 days from receipt (77 days from PN)

West Liberty Telephone Company – 108 days from receipt (77 days from PN)

CTC Video Services, LLC – 99 days from receipt (77 days from PN)

En-Touch Systems, Inc. – 93 days from receipt (77 days from PN)

Rural ATM Digital Providers Group (58 companies) – 88 days from receipt (No PN issued)

Knology, Inc. – 88 days from receipt (56 days from PN)

Local Internet Service Company – 88 days from receipt (77 days from PN)

Guam Cablevision – 88 days from receipt (56 days from PN)

Bernard Telephone Company Inc. – 84 days from receipt (56 days from PN)

Puerto Rico Cable Acquisition Corp. d/b/a Choice Cable TV – 65 days from receipt (42 days from PN)

Guiness Communications, Inc. d/b/a Delta Cable Vision – 64 days from receipt (42 days from PN)

Volcano Vision, Inc. – 57 days from receipt (35 days from PN)

Great Plains Cable Television, Inc. – 75 days from receipt (59 days from PN)

James Cable, LLC – 73 days from receipt (59 days from PN)

La Motte Telephone Company – 52 days from receipt (35 days from PN)

Attachment A

Colo Telephone Company – 67 days from receipt (38 days from PN)

Griswold Cooperative Telephone Company – 67 days from receipt (38 days from PN)

Coon Creek Telephone Company – 66 days from receipt (38 days from PN)

Interstate Cablevision Company – 66 days from receipt (38 days from PN)

Wellman Cooperative Telephone Association – 66 days from receipt (38 days from PN)

ComSouth Telesys, Inc. – 66 days from receipt (38 days from PN)

Innovative Cable TV St Thomas-St. John and St Croix – 61 days from receipt (38 days from PN)

XIT Telecommunication & Technology LTD d/b/a XIT Communications – 54 days from receipt (38 days from PN)

NTS Communications, Inc. – 48 days from receipt (38 days from PN)

The City of Crosslake, Minnesota d/b/a Crosslake Communications – 7 days from receipt (No PN issued)

IPTV Operators Group (49 companies) – 28 days from receipt (No PN issued)

Cablevision of Marion County – 7 days from receipt (No PN issued)

Massillon Cable TV – 23 days from receipt (No PN issued)

Attachment B

All Pending Requests for Waiver of the Integration Ban

Northeast Oklahoma IPTV Providers – received June 18, 2007 (Placed on PN July 6, 2007); pending 86 days

IPTV Operators Group #2 (10 companies) – received June 19, 2007 (Placed on PN August 6, 2007); pending 85 days

Home Town Cable TV, LLC – received June 23, 2007 (Placed on PN July 6, 2007); pending 81 days

Premier Communications, Inc. – received June 26, 2007 (Placed on PN July 6, 2007); pending 78 days

Allegiance Communications, LLC – received June 28, 2007 (Placed on PN July 6, 2007); pending 76 days

Panora Cooperative Cable Association, Inc. – received June 28, 2007 (Placed on PN July 12, 2007); pending 76 days

RC Technologies Corporation – received June 29, 2007 (Placed on PN July 12, 2007); pending 75 days

Longview Cable and Data LLC – received June 29, 2007 (Placed on PN July 12, 2007); pending 75 days

NTCA/OPASTCO – received June 29, 2007 (Placed on PN July 23, 2007); pending 76 days

Gardonville Cooperative Telephone Association – received June 29, 2007 (Placed on PN July 12, 2007); pending 75 days

Pembroke Advanced Communications Inc. – received July 2, 2007 (Placed on PN August 6, 2007); pending 72 days

Hart Cable, Inc. – received August 9, 2007 (Placed on PN August 31, 2007); pending 34 days

The New York Times

THE NEW YORK TIMES **OP-ED** SATURDAY, JUNE 2, 2007

The Price of Free Airwaves

By Michael J. Copps

WASHINGTON

As a member of the Federal Communications Commission, I often hear how fed up Americans are with the news media. Too much "If it bleeds it leads" on the evening news and not enough real coverage of local issues. Too little high-quality entertainment and too many people eating bugs.

It doesn't have to be this way. America lets radio and TV broadcasters use public airwaves worth more than half a trillion dollars for free. In return, we require that broadcasters serve the public interest: devoting at least some airtime for worthy programs that inform voters, support local arts and culture and educate our children — in other words, that aspire to something beyond just minimizing costs and maximizing revenue.

Using the public airwaves is a privilege — a lucrative one — not a right, and I fear the F.C.C. has not done enough to stand up for the public interest. Our policies should reward broadcasters that honor their pledge to serve that interest and penalize those that don't.

The F.C.C. already has powerful leverage to hold broadcasters to their end of the bargain. Every eight years, broadcasters must prove that they have served the public interest in order to get license renewal. If they can't, the license goes to someone else who will. It's a tough but fair system — if the commission does its job.

The problem is that, under pressure from media conglomerates, previous commissions have eviscerated the renewal process. Now we have what big broadcasters lovingly call "postcard renewal" — the agency typically rubber-stamps an application without any substantive review. Denials on public interest grounds are extraordinarily rare.

Just recently, the F.C.C. made news because it fined the Spanish-language broadcaster Univision a record-breaking $24 million. Univision claimed that its stations offered three hours of children's educational programming per week — one of the few public interest rules still on the books — in part by showing a soap opera involving 11-year-old twins.

That was the right decision. But, viewed closely, it also illustrates just how slipshod our renewal process has become.

The fine was not levied at the ordinary time. In fact, the license term for one of the two stations initially at issue had expired 18 months earlier. This is typical — applications opposed by watchdog groups often languish for years while the broadcaster is permitted to continue business as usual. Then infractions are commonly disposed of with a small fine.

The commission paid attention to the Univision complaint because the station was part of a chain of 114 TV and radio stations being transferred from a public corporation to private equity firms. Without that, it is unclear when, if ever, the violations would have been acted upon. This even though scholars believe that one-fifth of what is billed as children's programming has "little or no educational value" and only one-third can be called "highly educational." Our children deserve better.

It wasn't always like this. Before the 1980s' deregulatory mania — when an F.C.C. chairman described television as a "toaster with pictures" — the commission gave license renewals a hard look every three years, with specific criteria for making a public interest finding. Indeed, broadcasters' respect for the renewal process encouraged them to pay for hard-hitting news operations. That was then.

Nowadays, a lot of people claim that because of the Internet, traditional broadcast outlets are an endangered species and there's no point in worrying about them. That's a mistake.

First, broadcast licenses continue to be very valuable. Univision's assets — many in small markets — were sold for more than $12 billion. A single station in Sacramento, owned by Sinclair Broadcasting, went for $285 million in 2004. A station in a megamarket like New York or Los Angeles could easily fetch half a billion dollars or more.

> The F.C.C. should compel broadcasters to serve the public.

Second, broadcast outlets are still primary, critical sources of information for the American public. Nearly 60 percent of adults watch local TV news each day — it remains the nation's most popular information source. And so it's imperative that broadcasters continue to provide high-quality coverage of local and national issues.

But ensuring they do so means putting teeth back into the renewal process. To begin with, shorten the license term. Eight years is too long to go without an accounting — we ought to return to the three-year model.

Let's also actually review a station's record before renewing its license. Here are just some of the criteria for renewal the F.C.C. considered in the 1990s but never put into place:

- Did the station show programs on local civic affairs (apart from the nightly news), or set aside airtime for local community groups?
- Did it broadcast political conventions, and local as well as national candidate debates? Did it devote at least five minutes each night to covering politics in the month before an election?
- In an era when owners may live thousands of miles from their stations, have they met with local community leaders and the public to receive feedback?
- Is the station's so-called children's programming actually, in the view of experts, educational?

All of this information ought to be available on the Web so people can see how their airwaves are being used.

These issues are even more pressing today: broadcasters are making the transition to digital technology that permits them to send several television and radio channels into our homes instead of the single channel they've had up to now. The F.C.C.'s next step after reforming the licensing process should be to address how this new digital capacity can increase local programs and also improve the generally shoddy coverage of minority and other under-served communities. New benefits for broadcasters should translate into public benefits, too.

If you need convincing that something needs to be done, consider that only about 8 percent of local TV newscasts in the month before the last presidential election contained any coverage whatsoever of local races, including those for the House of Representatives.

This low number is just one example of how poorly stations are serving their viewers. Do stations that make so much money using the public airwaves, but so plainly fail to educate viewers on the issues facing them, really deserve to have their renewals rubber-stamped? □

Michael J. Copps is a commissioner on the Federal Communications Commission.

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ONE HUNDRED NINTH CONGRESS

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December 19, 2006

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Martin:

I write with respect to the cable franchising item currently under consideration at the Commission. It would be extremely inappropriate for the Federal Communications Commission to take action that would exceed the agency's authority and usurp Congressional prerogative to reform the cable television local franchising process.

In a speech you gave on December 6th of this year, you proposed that the Commission establish:

(a) time frames for local franchising authorities to act on franchise applications, specifically, 90 days for entities that are already authorized to access a community's rights-of-way and 6 months for other applications;

(b) limits on what localities can require new entrants to pay in the form of franchise fees, specifically with respect to non-cable services and in-kind contributions;

(c) requirements concerning the ability of a local franchising authority to provide that a cable operator, after a reasonable period of time, become capable of providing cable service to all households in a franchise area; and

(d) requirements that pertain to consumers living in multiple dwelling units.

In addition, it has come to my attention from press reports and other sources that, in this same proceeding, you may be proposing that the Commission establish:

(e) requirements that would deem an application granted or confer interim authority for use of a community's public property after the expiration of the Commission-established time frames;

(f) a regime that could preempt in whole or part, existing or future State or local laws or franchise requirements; and

(g) requirements concerning when providers that are constructing communications networks capable of offering telephone, broadband, and video services are subject to the franchise requirement.

Should you proceed with consideration of such an order that adopts these or similar proposals, I seek answers to the following questions concerning the Commission's explicit authority to take such actions:

1. For each of the proposals enumerated above as well as for other proposals adopted, please provide the specific statutory and legal authority, including citations, for the Commission to take any of these steps.

2. To the extent that the Commission order affects the existing relationship between the various sections of Title VI of the Communications Act, please provide the statutory and legal citations that provides the Commission with specific authority to do so. In particular, I am interested in an explanation of how your actions comply with long-standing statutory construction principles.

3. To the extent that the Commission's order effectively confers access to municipal or other public property rights on a permanent or interim basis, please provide the statutory and legal citations granting the Commission specific authority to do so.

4. To the extent that the Commission's order could compel a local government to enter into a contract with a cable service provider, please provide the statutory and legal citations for the Commission's specific authority to do so.

5. To the extent that the Commission's order proposes to treat new entrants on a different basis from incumbents or other competitive cable operators operating under an existing franchise agreement, please provide the statutory and legal citations for the Commission's specific authority to do so.

6. To the extent that the Commission's order would affect the existing statutory remedies in Title VI, including burdens of proof, please provide the statutory and legal citations for the Commission's specific authority to do so.

I look forward to receiving your answers by no later than Tuesday, January 3, 2007. In addition, I ask that this letter and the answers provided be placed in the official record of the Commission on this matter.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

December 20, 2006

John D. Dingell, Ranking Member
U.S. House of Representatives
Committee on Energy and Commerce
Washington, D.C. 20515-6115

Dear Representative Dingell:

This letter responds to your inquiry of December 19, 2006, regarding the cable franchising item at the Commission. Each of your questions is addressed below.

Question 1: For each of the proposals enumerated above as well as for other proposals adopted, please provide the specific statutory and legal authority, including citations, for the Commission to take any of these steps.

The Commission has broad authority to adopt rules to implement Title VI and, specifically, Section 621(a)(1) of the Communications Act of 1934, as amended (the Act). As the Supreme Court has explained, the Commission serves "as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.'" *United States v. Southwestern Cable Co.,* 392 U.S. 157, 167-68 (1968) (citations omitted). To that end, "[t]he Act grants the Commission broad responsibility to forge a rapid and efficient communications system, and broad authority to implement that responsibility." *United Telegraph Workers, AFL-CIO v. FCC,* 436 F.2d 920, 923 (D.C. Cir. 1970) (citations and quotations omitted). Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). According to the Supreme Court, "the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'" *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 378 (1999). That grant of authority therefore necessarily includes Title VI of the Communications Act in general, and Section 621(a)(1) in particular. Other provisions in the Act reinforce the Commission's general rulemaking authority. Section 303(r), for example, states that "the Commission from time to time, as public convenience, interest, or necessity requires shall ... make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act...." *See also* 47 U.S.C. § 151 (the Commission "shall execute and enforce the provisions of this Act"). Our authority is reinforced by Section 4(i) of the Act which gives us broad power to perform acts necessary to execute our functions as well as the mandate in section 706 of the Act that we encourage the deployment of broadband services to all Americans. *See* 47 U.S.C. § 154(i) (stating that the Commission "may perform any and all acts, make such rules and regulations, and issue

such orders, not inconsistent with the Act, as may be necessary in the executions of its functions."); 47 U.S.C. § 157 nt.

More specifically, Section 2 of the Communications Act grants the Commission explicit jurisdiction over "cable services." 47 U.S.C. § 152 ("The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI."). Furthermore, Congress specifically charged the Commission with the administration of the Cable Act, including Section 621, and federal courts have consistently upheld the Commission's authority in this area. *See City of Chicago v. FCC,* 199 F.3d 424 (7th Cir. 1999) (finding the FCC is charged by Congress with the administration of the Cable Act, including Section 621); *see also City of New York v. FCC,* 486 U.S. 57, 70 n.6 (1988) (explaining that section 303 gives the FCC rulemaking power with respect to the Cable Act); *National Cable Television Ass'n. v. FCC,* 33 F.3d 66, 70 (D.C. Cir. 1994) (upholding Commission finding that certain services are not subject to the franchise requirement in Section 621(b)(1)); *United Video v. FCC,* 890 F.2d 1173, 1183 (D.C. Cir. 1989) (denying petitions to review the Commission's syndicated exclusivity rules); *ACLU v. FCC,* 823 F.2d 1554 (D.C. Cir. 1987) (upholding the Commission's interpretive rules regarding Section 621(a)(3)). Thus, just as the Commission has the authority to interpret other provisions of Title VI, it also has the authority to interpret section 621(a)(1)'s requirement that LFAs not "unreasonably refuse to award an additional competitive franchise." Indeed, in another context, the D.C. Circuit noted that the term "unreasonable" is among the "ambiguous statutory terms" in the Communications Act, and that the "court owes substantial deference to the interpretation the Commission accords them." *Capital Network System, Inc. v. FCC,* 28 F.3d 201, 204 (D.C. Cir. 1994).

In addition to this general authority to implement Title VI, the Commission exercised specific statutory authority with respect to issues (a)-(g) identified in your letter:

(a) time frames for local franchising authorities to act on franchise applications, specifically, 90 days for entities that are already authorized to access a community's rights-of-way and 6 months for other applications.

The order finds that a local franchising authority may unreasonably refuse to award an additional competitive franchise pursuant to section 621(a)(1) through routes other than issuing a final decision denying a franchising application, such as by not issuing any decision in a reasonable period of time. The Commission's order thus establishes pursuant to Section 621(a)(1) the reasonable period of time in which LFAs should issue such decisions, taking into account the differences between those applicants with access to rights-of-way and those that lack such access. The Commission has wide discretion in setting the time limits, which is an exercise in line drawing. The line drawing authority of the Commission has been soundly affirmed by federal courts. *See, e.g., Nuvio Corp. v. FCC,* No. 05-1248, slip op. at 15 (December 15, 2006); *AT&T Corp. v. FCC,* 220 F.3d 607, 627 (D.C. Cir. 2000).

(b) limits on what localities can require new entrants to pay in the form of franchise fees, specifically with respect to non-cable services and in-kind contributions;

Federal-level limitations on franchise fees are set forth in Sections 622(b) and (g), 47 U.S.C. § 542(b), (g), which the Commission has the authority to interpret based on the principles set forth above. Moreover, in 2002 the Federal Communications Commission concluded that cable-modem service is an information rather than a cable or telecommunication service. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C. Rcd. 4798 ¶¶ 7, 33-69 (Mar. 15, 2002) (*Cable Modem Order*). That decision was ultimately affirmed in *NCTA v Brand X Internet Services*, 125 S. Ct. 2688 (2005). Specifically, the Commission determined in the Cable Modem Order, that a franchise authority may not assess franchise fees on non-cable services, such as cable modem service, stating that "revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determining." *Cable Modem Order*, 17 F.C.C. Rcd at 4851. With respect to in kind contributions, Section 622(g)(1) of the Communications Act broadly defines franchise fees to include, with specified exceptions for public educational or government access (PEG) facilities, "any tax, fee, or assessment of any kind." The legislative history of the 1984 Cable Act, which adopted the franchise fee limit, specifically provides that "lump sum grants not related to PEG access for municipal programs such as libraries, recreation departments, detention centers or other payments not related to PEG access would be subject to the 5 percent limitation." H.R. Rep No. 98-934 (1984), 1984 U.S.C.C.A.N. 4655, 4702.

(c) requirements concerning the ability of a local franchising authority to provide that a cable operator, after a reasonable period of time, become capable of providing service to all households in a franchise area;

As stated above, the Commission's order concludes that we have authority to interpret and implement the ambiguous phrase "unreasonably refuse" in Section 621(a)(1) of the Act. In so doing, the order finds it to be unreasonable for a LFA to refuse to award a competitive franchise on the grounds that the applicant will not agree to certain build-out requirements. An example of an unreasonable build-out requirement would be if the LFA required the new entrant to service everyone in the franchise area before it has begun providing service to anyone.

Significantly, the Commission's findings are informed by its conclusion that Section 621(a)(3), which prohibits redlining, and Section 621(a)(4)(A) of the Act, which provides a reasonable period of time for build out, do not require universal build-out. *See* 47 U.S.C. §541(a)(3) & (4)(A); *see also ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987) (finding that the redlining provision contained in section 621(a)(3) of the Act does not require universal build-out); *Americable International, Inc. v. Department of Navy*, 129 F.3d 1271 (D.C. Cir. 1998) (holding that section 621(a)(4)(A) does not require universal build-out).

(d) requirements that pertain to consumers living in multiple dwelling units;

As stated above, the Commission's order concludes that we have authority to interpret and implement the ambiguous phrase "unreasonably refuse" in Section 621(a)(1) of the Act. In so doing, the order suggests that it may be unreasonable for a LFA to require a new entrant to build out and provide service to buildings to which the new entrant cannot obtain access on reasonable terms. The order, however, does not propose to adopt any rules on this issue. Thus, there are no specific requirements that pertain to consumers living in multiple dwelling units.

(e) requirements that would deem an application granted or confer interim authority for use of a community's public property after the expiration of the Commission-established time frames;

The Commission's order does not ever confer access to municipal or other public property rights on a permanent basis. The Commission's order could theoretically grant a franchise applicant authority to offer video service on an interim basis, but only in an extremely narrow set of circumstances. This would occur only if: (1) the applicant files an application in accordance with the terms of the Commission's order and any applicable state or local requirements; and (2) a LFA fails to grant or deny the application within the reasonable time frame established by the Commission's order, which is six months in the case of an applicant without access to rights-of-ways. The Commission anticipates that this will occur rarely, if ever, because LFAs will act within the reasonable time frames established by the Commission's order. Indeed, the Commission's order is designed to provide an incentive for LFAs to do so. If the LFA ultimately acts to deny the franchise after the expiration of the deadline, the applicant's interim operating authority is terminated, and the applicant must appeal such denial pursuant to Section 635(a) of the Communications Act.

The Commission has the authority to deem franchise applications granted under its general authority to implement the Communications Act, including Section 621(a)(1), which specifically prohibits LFAs from unreasonably refusing to award a competitive franchise. *See* Answer to Question 1 above. The Commission's order appropriately concludes that it is unreasonable for a LFA to refuse to issue a decision on a competitive franchise application after considering it for an appropriate period of time. This approach is consistent with other federal regulations designed to address unreasonable inaction on the part of a State decision maker. *See, e.g.,* 40 C.F.R. § 141.716(a) (watershed control plans that are submitted to a State and not acted upon by the regulatory deadline are "considered approved" until the State subsequently withdraws such approval.); 42 C.F.R § 438.56(e)(2) (an application to disenroll from a Medicaid managed care plan shall be "considered approved" if not acted on by a State agency within the regulatory deadline).

(f) a regime that could preempt in whole or part, existing or future State or local laws of franchise requirements;

Federal preemption of State or local laws arises from the Supremacy Clause, which provides that federal law is the "supreme Law of the Land." U.S. Const., Art. VI, cl.2. Preemption occurs when Congress expressly preempts state law. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). Section 636(c) of the Communications Act expressly preempts inconsistent State and local laws. It provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c). This provision thus precludes localities from acting in a manner inconsistent with the Commission's interpretations of Title VI, such as Section 621(a)(1), so long as those interpretations are valid. *See, e.g., Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216 (1st Cir. 2005) (finding municipal ordinances that imposed franchise fees on cable operators were preempted under Section 636(c) where inconsistent with Section 622 of the Communications Act). It is the Commission's job, in the first instance, to determine the scope of the subject matter expressly preempted by Section 636. *See Cipollone*, 505 U.S. at 517; *Capital Cities Cable*, 467 U.S. 691, 699 (1984). As noted above, the Commission adopted the rules in its order pursuant to its interpretation of Section 621(a)(1) and other relevant Title VI provisions. These rules represent a reasonable interpretation of relevant provisions in Title VI as well as a reasonable accommodation of the various policy interests that Congress entrusted to the Commission. Pursuant to Section 636(c), the Commission thus reasonably concluded that these rules preempt inconsistent local laws.

Preemption also can be implied. *See Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963). Courts have found implied "conflict preemption" where compliance with both state and federal law is impossible or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* In the order, the Commission found that certain local laws are preempted to the extent that they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Among the stated purposes of Title VI is to (1) "establish a national policy concerning cable communications," (2) "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community," and (3) "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521 (1), (2) & (6). The record before the Commission showed that the current operation of the franchising process at the local level conflicts with these national multichannel video policies by often imposing substantial delays on competitive entry and requiring unduly burdensome conditions that deter entry. Thus, not only are Section 636(c)'s requirements for preemption satisfied, but preemption in these circumstances is proper pursuant to the Commission's judicially recognized ability, when acting pursuant to its delegated authority, to preempt local regulations that conflict with or stand as an obstacle to the accomplishment of federal objectives. *See, e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986).

(g) requirements concerning when providers that are constructing communications networks capable of offering telephone, broadband, and video services are subject to the franchise requirements.

The order clarifies that a LFA's jurisdiction extends only to the provision of cable service over cable systems. To the extent a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system, it is unreasonable for a LFA to refuse to award a franchise based on issues related to such services or facilities. For example, the Commission found, and the Supreme Court agreed, that cable modem services are information services and not subject to the requirements of Title VI. *Cable Modem Order* at para. 68. Local regulations that attempt to regulate any non-cable services offered by video providers or facilities that do not qualify as cable systems may be preempted, therefore, because such regulations are beyond the scope of local franchising authority and are inconsistent with the definition of "cable system" in Section 602(7)(C). *See* 47 U.S.C. § 522(7)(C). The order does not propose to adopt any rules on this issue.

Question 2: To the extent that the Commission order affects the existing relationship between the various sections of Title VI of the Communications Act, please provide the statutory and legal citations that provide the Commission with specific authority to do so. In particular, I am interested in an explanation of how your actions comply with long-standing statutory construction principles.

The Commission's order does not affect the existing relationship between the various sections of Title VI. The Commission is simply exercising its longstanding authority to interpret and implement the terms of the Communications Act, including Section 621(a)(1). Thus, for example, the Commission's order finds that it is unreasonable for a LFA to refuse to award a competitive franchise because the applicant will not agree to franchise terms that violate the franchise fee provisions contained in Section 622 of the Act. 47 U.S.C. § 542.

Question 3: To the extent that the Commission's order effectively confers access to municipal or other public property right on a permanent or interim basis, please provide the statutory and legal citations granting the Commission specific authority to do so.

As stated above, the Commission's order does not ever confer access to municipal or other public property rights on a permanent basis. The Commission's order could theoretically grant a franchise applicant authority to offer video service on an interim basis, but only in an extremely narrow set of circumstances. This would occur only if: (1) the applicant files an application in accordance with the terms of the Commission's order and any applicable state or local requirements; and (2) a LFA fails to grant or deny the application within the reasonable time frame established by the Commission's order, which is six months in the case of an applicant without access to rights-of-ways. The Commission anticipates that this will occur rarely, if ever, because LFAs will act within the reasonable time frames established by the Commission's order. Indeed, the

Commission's order is designed to provide an incentive for LFAs to do so. If the LFA ultimately acts to deny the franchise after the expiration of the deadline, the applicant's interim operating authority is terminated, and the applicant must appeal such denial pursuant to Section 635(a) of the Communications Act.

The Commission has the authority to deem franchise applications granted under its general authority to implement the Communications Act, including Section 621(a)(1), which specifically prohibits LFAs from unreasonably refusing to award a competitive franchise. *See* Answer to Question 1 above. The Commission's order appropriately concludes that it is unreasonable for a LFA to refuse to issue a decision on a competitive franchise application after considering it for an appropriate period of time. This approach is consistent with other federal regulations designed to address unreasonable inaction on the part of a State decision maker. *See, e.g.,* 40 C.F.R. § 141.716(a) (watershed control plans that are submitted to a State and not acted upon by the regulatory deadline are "considered approved" until the State subsequently withdraws such approval.); 42 C.F.R § 438.56(e)(2) (an application to disenroll from a Medicaid managed care plan shall be "considered approved" if not acted on by a State agency within the regulatory deadline).

Question 4: To the extent that the Commission's order could compel a local government to enter into a contract with a cable service provider, please provide the statutory and legal citations for the Commission's specific authority to do so.

The Commission's order does not under *any* circumstances compel a local government to enter into a contract with a cable service provider.

Question 5: To the extent that the Commission's order proposes to treat new entrants on a different basis from incumbents or other competitive cable operators operating under an existing franchise agreement, please provide the statutory and legal citations for the Commission's specific authority to do so.

The Commission's order treats new entrants on a different basis from existing franchisees. The Commission is interpreting a statutory provision, *i.e.,* Section 621(a)(1), that applies *only* to new, competitive franchise applicants. *See* 47 U.S.C. § 541(a)(1) ("a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise"). Thus, section 621(a)(1) provides a statutory basis for treating new, competitive applicants differently from incumbents. Indeed, section 621(a)(1), by its terms, provides the Commission with no authority with respect to incumbents. The record also demonstrates that competitive video providers that enter the market today are in a fundamentally different situation than incumbent cable operators. In the further notice attached to the order, however, the Commission is seeking comment on its tentative conclusion to extend relief to existing franchisees as well.

Question 6: To the extent that the Commission's order would affect the existing statutory remedies in Title VI, including burdens of proof, please provide the statutory and legal citations for the Commission's specific authority to do so.

The Commission's order does not affect the existing statutory remedies in Title VI. Competitive franchise applicants who believe that a franchising authority has improperly denied their applications may still file an action in court pursuant to 47 U.S.C. § 555. At that point, as is the case now, the reviewing court must determine whether, under the particular facts of each case, a franchising authority violated Section 621(a)(1) by unreasonably refusing to award an additional competitive franchise. The Commission's order simply provides guidance with respect to what it means to "unreasonably refuse to award an additional competitive franchise" under Section 621(a)(1) of the Act.

Thank you for your interest in this important matter. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Kevin J. Martin