Keynote of
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Thank you Ray for that introduction, and for your leadership at PFF over the years. I'm pleased to know that you will continue to share your scholarship and insight with us from Denver. It's great to be with so many business leaders, scholars and policy makers to share information, analysis and what you call "informed speculation." So, I guess today's my turn to engage in some informed speculation of my own.

To kick things off tonight, I want to share with you my perspective on the proper role of the FCC during a challenging time of technological transformation in the media and entertainment industries.

Since "freedom" is literally PFF's middle name, I'll discuss these policy challenges from the perspective of freedom: free speech and free markets -- issues PFF cares about a lot. I won't talk about free services, because that makes a lot of you nervous. When talking about these freedoms, I will discuss how the FCC's statutory obligation is to balance market forces against sometimes competing social needs and obligations -- the public interest.

It sometimes seems like regulators and people in the private sector speak different languages and do not understand each other's roles and responsibilities. In simple terms, businesses seek to maximize profit, while government officials are expected to promote the public interest.

From my perspective, the public interest includes significant consideration of our greater economic *and* social welfare. As the needs of our technological society become increasingly complex, members of the public and private sectors must work together as never before to solve problems. By doing so, businesses will profit, and consumers will receive better services and products at competitive prices.

At my first confirmation hearing in 2002, I testified I generally preferred market-oriented solutions over government mandates when the markets function properly -- and competitively -- and when government intervention is not necessary to promote the public interest.

In most circumstances, in the absence of market failures, it's best for the government to refrain from acting intrusively. Under other circumstances, it's best for the government to tread carefully, and impose an appropriate regulatory solution. In those instances when overriding issues of central importance to America's democracy and way of life are at stake, a strong government role can be necessary.

Today, I would like to reflect on some key issues we are dealing with in the context of the proper role of government, and where restraint is appropriate in the absence of market failures or public interest considerations. There are four key issues I will focus on that are at forefront of our agenda and recent headlines. We've heard from PFF on them. They include multicast must-carry; á la carte pricing; media ownership; and of course, indecency.

On three of these issues, I believe the FCC should show more restraint than some have advocated. On media ownership, I continue to believe its central importance to our society merits a strong, continuing government role.

Multicast Must-Carry

Perhaps the best example of government overreach was an item that many of you know circulated on the eighth floor for some time – multicast must-carry. The item would have imposed a requirement on cable operators to carry all of a broadcast station's free, over-the-air programming – which could include up to 5 or 6 channels. If it had been approved, it would've been misguided and unfortunate.

Without clear congressional directive or public interest obligations, I see no market failure or public interest rationale to justify such a governmental intrusion. In the heyday of analog broadcasting, the essential local service that broadcasters provided led Congress to establish, and the Supreme Court to narrowly uphold, a single-channel carriage mandate. At that time, without must-carry, over-the-air viewers were threatened with losing many of the broadcast channels.

Today, the digital television transition holds the promise that broadcasters will deliver great new services to consumers. But without protections for the public, nothing useful is guaranteed. Theoretically, the FCC could be mandating 24/7 infomercials – minus 3 hours a week for required children's programming. What's the market failure that is designed to address? How is the public interest benefited by squeezing out C-SPAN 3 to make room for Home Shopping Extravaganza – the Ocho? Why is the government even thinking about intervening in those marketplace decisions?

This isn't entirely theoretical. I'm already concerned with reports of the level of paid programming already on the public airwaves. A 2003 study found that community public affairs programming accounts for less than 1/2 of 1 percent of local TV programming nationwide – that compares to 14.4 percent for paid programming. Need the government mandate more?

Broadcasters would have the FCC impose mandatory multicast carriage obligations on cable companies without any assurance that true local service will materialize on each new digital program stream, and in the absence of a demonstrated market failure. In fact, cable operators have a strong market incentive to carry quality local programming because of competition from more spectrum-limited DBS satellite competitors. And, with the entry of the phone companies into the multichannel video programming market, along with growing options on the Internet, broadcasters are in a strong position to negotiate carriage of their multiple programming streams.

Absent any clear benefit for the public, multicast must-carry is Exhibit A of government overreach and over-regulation.

Á la Carte

Turning to a potential Exhibit B -- is mandatory á la carte pricing. We need to carefully consider how regulation may affect consumers by undercutting the business models of many segments of the media and entertainment industry.

Of course, á la carte has been proposed as part of the solution to cable rate hikes, a consumer's "right" to choose the programming she wants, and the ability of parents to protect their children from objectionable programming.

But in 2004, the FCC released a study, relying on the economic analysis of Booz Allen, which found that there was not systematic market failure that would justify mandatory á la carte pricing. In fact, it found that such a regime would hurt consumers.

Commission staff recently revised the 2004 study, in part to correct an error in Booz Allen's computation. This "Further Report" concluded that some consumers might see lower bills with á la carte pricing. But, it ran contrary to the FCC's initial report and to many independent economic analyses that concluded á la carte would cost consumers more for fewer channels and, in fact, hurt diversity of programming..

Jeff Eisenach, who we will hear from tomorrow, and Richard Ludwick pointed out that the Further Report did not state that an á la carte mandate would benefit consumers or increase economic welfare, nor did it support such a conclusion. The Further Report merely concluded that "many consumers could be better off under an á la carte model."

Even the nonpartisan Congressional Research Service criticized the FCC, observing that "these inconsistent findings by expert agency have caused some confusion." CRS concluded that "most of the criticism of the initial report that are presented in the further report either are not supported by the available market data or cannot be proven."

The Further Report also failed to fully analyze basic economic costs that any objective study should have considered. For instances, what about the transition costs: more than half of all cable subscribers receive analog cable service and would need set-top boxes for á la carte. Paying approximately $4.50 per month for each set-top box, two-television households would have to pay an additional $9.00 on their monthly bill.

What about the transaction costs? Operators would have to restrict access to those networks the household chooses to purchase and to bill households for their selections. This would certainly negatively impact demand.

And, what about the increased marketing costs to retain subscribers? As Disney reported, during Disney Channel's early years as an á la carte service, it had to contend with churn which was as much as 75 percent per year! From 1990 through 1997, Disney Channel invested an average of

10 percent of its total revenue from sales each year on telemarketing, subscriber acquisition programs and retention programs. And what about the programmer's reduced ad revenue?

One of the most striking aspects of the Further Report is that it failed to consider our statutory obligation to promote diversity of programming – one of the principle goals of the Commission's media oversight. There's no good reason or justification for such a blatant omission.

So, in short, an á la carte mandate could be an intrusive regulation that most studies say would cost consumers more for fewer channels. And that study – the second FCC report – is inconsistent with the FCC's own first report, and has come under criticism from the independent Congressional Research Service.

Media Ownership

If we were serious about getting to the root cause of the bundling that can raise cable bills and reduce consumer choice, we would focus on the impact of media consolidation. Addressing that issue might truly move us closer to an á la carte world. If there is one area where public interest considerations are overriding, it is media ownership, which affects our very democracy and what the Supreme Court has called the "uninhibited marketplace of ideas."

As you all know, last month we launched a rulemaking proceeding to address the Third Circuit's remand and to perform the quadrennial review of all of our media ownership rules, as Congress required. Recently, Commissioner McDowell referred to this proceeding as "one big kidney stone" that needs to pass. I tend to agree, but I think we need to add more fiber to our diet before you try to pass it.

My job is to promote the public interest and, in the context of media ownership, that has always meant localism, diversity and competition. Broadcasters, unlike any other FCC licensees, have a primary responsibly to promote the public interest as well. And to help them meet that responsibility, the federal government – without any competitive bidding or public auction – granted broadcasters exclusive use of the some of the best spectrum to perform a public service. The value of that spectrum is tens of billions of dollars.

In the capital markets, when investors back a business, they expect the companies will report their financials on a quarterly and annually basis, and they will be held to certain performance standards. Well, shouldn't media companies provide the public –a principal investor in their company – with information about how they are satisfying their specific, quantifiable public interest obligations?

Some argue that, in today's media marketplace, consumers have a plethora of information sources so there is little need for government intervention to promote the public interest because the marketplace will do it. While there seem to be more outlets than ever for Americans to get news, a recent Harris Poll and Pew Research study found that the majority continues to choose to get its news and information most frequently from broadcast media and their associated websites.

In the emerging age of digital broadcasting, the FCC needs to retain strong media ownership limits, enhance digital broadcasters' public interest obligations, and at the very least, enforce consumer protection laws, such as our anti-payola and sponsorship ID rules, which we still have on the books. Allowing fewer media companies to control what Americans, see, hear and read, without quantifiable public interest standards or a clear obligation to comply with anti-deceptive advertisement laws, will not further our public interest goals. More importantly, it will not make our democracy well informed and equipped to participate in important public policy discourse.

I believe that the battle over media ownership has deep roots in American history and tradition. It is no coincidence that the uprising over the attempt to allow big media to get bigger was so heartfelt and widespread. Distrust of "big media" and centralization of the means of communications is rooted in the spirit of America. And, I intend to fight for that spirit.

Indecency

Finally, I would like to discuss indecency regulation.

Indecency is another difficult area where the FCC has competing obligations. We have to protect freedom of speech, but it is also our duty is to regulate the broadcast of indecent material to the fullest extent permitted by the Constitution. After all, safeguarding the well-being of our children is truly a compelling national interest.

The Commission's authority to regulate indecent content over the public airwaves was narrowly upheld by the Supreme Court with the admonition that we should exercise that authority with the utmost restraint. Given the Court's guidance in *Pacifica,* the Commission has repeatedly stated that we would judiciously walk a "tightrope" in exercising our regulatory authority. To put it simply, I believe that a rational and principled "restrained enforcement policy" is not a matter of mere regulatory convenience; it is a constitutional requirement.

I was the sole partial dissenter in the Commission's most recent decision because while some of the programs discussed in the Omnibus Order were indecent and deserving of sanction, some of them, contrary to the Commission's findings, were not.

I believe that the Commission's last batch of decisions dangerously expands the scope of indecency and profanity law, without first attempting to determine whether we are applying the appropriate contemporary community standards.

The Order built on and stretched beyond the limits of our precedent in one of the most difficult cases we have ever decided, the *Golden Globe Awards* case. The precedent set in that case – any use of the f-word was *per se* indecent and profane – had been questioned by numerous broadcasters, constitutional scholars and public interest groups, who have asked us to clarify our reasoning.

Rather than reexamine the *Golden Globe Awards* case, the majority used it as a springboard to add new words to the pantheon of those deemed to be inherently sexual or excretory, and consequently indecent and profane, irrespective of a fleeting and isolated use. By failing to

address the many serious concerns raised in *Golden Globe Awards*, before prohibiting the use of additional words, we fell short of meeting the constitutional standard and walking the tightrope of a restrained enforcement policy.

As it turned out, because the FCC failed to act on the petitions for reconsideration of the *Golden Globe Awards* case, which were filed over two years ago, the Commission has had to take the embarrassing step of asking the Second Circuit Court of Appeals to remand to the FCC a number of indecency cases in the Omnibus Order that were squarely based on *Golden Globe Awards*.

At the time of the Omnibus decision, I cautioned that the Commission's careless approach endangered the very authority we so delicately retained to enforce broadcast decency rules. I warned that, if the Commission's zeal leads it to overstep its statutory authority, the Commission could find its authority circumscribed by the courts. We may forever lose the ability to prevent the airing of indecent material, barring an unlikely constitutional amendment setting limits on the First Amendment.

In the Omnibus order, I expressed concern with regard to the example of the acclaimed Martin Scorsese documentary "The Blues: Godfathers and Sons." It was clear from a commonsense viewing of the program that coarse language is a part of the culture of blues musicians and performers. To accurately reflect their viewpoint and emotion for blues music requires the airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary.

Over my objection, however, the Commission found the documentary indecent. As a result, PBS and other news and information outlets are forced to take extra steps of precaution to avoid the wrath of the Commission. They're now perplexed about what to do with a WWII documentary by Ken Burns. If "Saving Private Ryan" was acceptable, why not real soldiers talking about the same conflict? But if you can't say it in a blues documentary, why can you say it in a war documentary? You can see us tying ourselves in knots and confusing everyone. That's not the restraint the Commission promised the Supreme Court in *Pacifica*.

I don't believe the Commission has provided broadcasters a coherent and principled framework that is rooted in commonsense and sound constitutional grounds. While we often spend most of our time taking about economic freedom, freedom from governmental intrusion into speech is just as important. As a father of two, I believe that the government has a legitimate interest in protecting children from indecent and overly commercial content. I fully support that, and have participated in stepping up our enforcement efforts. But I also believe that, as government officials, we are sworn to uphold the Constitution, and need to avoid overstepping our bounds.

Conclusion

As you reflect on all of these issues I've raised this evening, it may come as a surprise to some of you that I am concerned on three out of four of these top issues with the potential for the FCC overstepping its bounds through heavy-handed regulation of the media. Because I have been such an outspoken opponent of media consolidation, for which I make no apology, it may not always be clear that I believe restraint is often warranted. In fact, because I take the public

interest and consumer welfare so seriously, I loathe having the government intervene in cases like multicast must carry or á la carte based on unclear justifications as to how mandates would help the public. As I said at the beginning, we should only do so when there are demonstrated market failures or public interest considerations. To the extent possible, we should let the many benefits of free markets and free speech guide our deliberations.

Thank you for having me, and I look forward to a wonderful conference in Aspen.