Speech of FCC Chairman Kevin J. Martin

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Thank you for that kind introduction and for the invitation to be with you today. I am very pleased to be here to talk about some challenging administrative law issues that affect the FCC.

The Commission has a long history of being involved with critical and novel administrative law issues. Indeed, the Communications Act's broad "public interest" standard has long characterized the broadest of congressional delegations of authority to an administrative agency.

At the FCC, this broad delegation was justified in part by the regulatory challenge that the Commission faces in trying to keep pace with technology. In upholding the original 1934 Communications Act, the Supreme Court stated:

Congress would have frustrated "the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems, for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details, in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding."

The pace of technological change is even more dramatic today than it was in 1943 when the Supreme Court made that statement. And these changes have continued to

challenge the Commission's regulatory framework. Today, IP technology is allowing various service providers to more easily provide services that were once provided by other industries.

But the Communications Act, which provides the Commission with the basis of most of its authority, has separate Titles that govern what once were these distinct industries. Each Title reflects the unique regulatory history of each service. Title I provides general authority. Title II, for example, governs wireline telephony. Title III governs wireless services, and Title VI governs cable television services. As a result of technological advances, however, these industries have been converging. Cable companies have begun offering telephone service. Telephone companies have begun offering video service. And both are offering high speed internet access services. Thus, it can be difficult to apply this statutory scheme in a coherent fashion that does not distort competition.

I believe that, from a policy perspective, the Commission must find a way to establish consistent regulatory frameworks to apply to these services as they are competing across various technological platforms. And I believe we should do so by removing regulations wherever possible. We should remove legacy rules from new investment and make sure that our regulations do not favor one company's investment in technology over another's. We need to make sure that we have created a level playing field to allow different network technologies to compete fairly with one another. I think the Commission has worked hard to address these problems, creating a regulatory "level playing field" with minimal regulations for competing platforms.

But I also believe we should be cautious of providing any regulatory agency with too much discretion. Today, I want to focus on several unique aspects of administrative law that have arisen recently in relation to the FCC: (1) the Supreme Court's recent Brand X decision – and the ability of an agency's interpretation to stand in the face of prior court decisions; (2) the legal standard for our periodic Regulatory Review; and (3) the standard for forbearance petitions.

Regulatory Deference

One of the challenges from convergence was how we should classify cable modem services. Are they telecommunications services subject to Title II common carrier regulation, or information services subject only to the Commission's more limited Title I ancillary jurisdiction? The Commission first addressed this issue in its 2002 Cable Modem Declaratory Ruling, which concluded that cable modem service is an information service and, therefore, is subject to a more limited regulatory regime.

The U.S. Court of Appeals for the Ninth Circuit vacated that decision, relying on a prior, contrary Ninth Circuit opinion concluding that cable modem service was a telecommunications service.

Last year, the Supreme Court reversed the Ninth Circuit and upheld the Commission's original decision. In the *Brand X* case, the Court held that even if a reviewing court had previously construed a statute differently, it must give *Chevron* deference to an expert agency's ***subsequent*** interpretation unless the statute is subject to only one permissible construction. The Court further held that the Commission reasonably construed the meaning of the term "information service" in finding that cable modem service is an integrated information service, not a telecommunications service.

Normally, we are disposed to think judicial interpretations trump those of agencies. But the Court held that "Before a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold the statute unambiguously requires the court's construction."

The Court's strong reaffirmation of *Chevron* deference means that an agency's statutory interpretation may trump an earlier judicial one, and that it may even change its mind about a statute's meaning after its earlier interpretation has been judicially affirmed.

In dissent, Justice Scalia argues this means that "every case that reaches step two of *Chevron* will be agency reversible."

Having the ability to adopt a less burdensome regulatory scheme for broadband services was critical to the Commission from a policy perspective. But I note that I agree with some of the concerns about the breadth of discretion available to our or any administrative agency as a result of this decision.

Biennial Review

Now I'd like to discuss two provisions of the Communications Act that were specifically designed to force the Commission to respond to changes in the marketplace. These provisions require the Commission: (1) to review the continued need for certain telecommunications regulations every two years; and (2) to forbear from enforcing telecommunications regulations and even statutory provisions in some circumstances. Both of these provisions are now 10 years old, having been passed as part of the Telecommunications Act of 1996. But, they are also relatively young in that many interpretive questions remain to be resolved by the Commission and the courts. It is also

noteworthy that both provisions are quite unusual from an administrative law point of view.

Section 11 of the Communications Act requires the Commission: (1) to review biennially its regulations that apply to the operations or activities of telecommunications service providers; and (2) to determine whether those regulations are "no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." Following such review, the Commission is required to modify or repeal any such regulations that are no longer necessary in the public interest.

In construing the meaning of Section 11, the D.C. Circuit has upheld a looser definition of the statutory term "necessary in the public interest" than the language of the statute suggests. The Court accepted the FCC's arguments that the term requires only that a regulation serve the public interest and does not require any higher showing of necessity. I had dissented from that FCC decision, arguing that Section 11's language requires a showing that a regulation is actually still "necessary."

The result of this decision gives the Commission substantially more discretion in deciding whether to retain rules, since it is not too difficult to justify a rule as in the public interest. The FCC thus managed to take a tool intended by Congress to impose some rigor on the FCC's analysis and turned it into more of a procedural hurdle. The Commission only has to explain periodically why regulations on the books are in the public interest.

Forbearance

Like Section 11, Section 10's forbearance provision was designed to keep the Commission rules current with the evolving competitive marketplace. Section 10 of the

Communications Act provides that the Commission "shall forbear" from applying any regulation or any provision of the Communications Act to a telecommunications carrier or service if the Commission finds that three conditions are met. The Commission must forbear if enforcement of the regulation or statutory provision: (1) is not necessary to ensure that charges or practices of the telecommunications carrier are just and reasonable and non- discriminatory; (2) is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. A decision to forbear may be limited to the petitioner or may apply to all similarly situated carriers. The Commission may grant a forbearance petition in whole or in part and must explain its decision in writing.

Section 10 is unusual in several respects. First, it enables regulated entities to seek relief from otherwise applicable statutory mandates. In the usual course, an agency may not waive a statutory requirement since the agency is subordinate to Congress. But Section 10 delegates to the Commission the authority to forbear from applying sections of the Communications Act to telecommunications carriers and services.

A second unusual aspect of section 10 is that it provides for the effective repeal of regulations outside the normal practice of notice and comment rulemaking. If the Commission determines that a petition for forbearance meets the three statutory criteria, it is required to forbear from applying the regulation to the telecommunications carrier or service. Although it is the Commission's usual practice to seek public comment on petitions for forbearance, Section 10 does not expressly require this. Further, although the rule remains in the Code of Federal Regulations, it is no longer operative with respect to the carriers or services specified in the Commission's forbearance order.

A third unusual aspect of Section 10 is that forbearance petitions are "deemed granted" unless the Commission denies the petition within one year, a period which the Commission may only extend for an additional three months.

This past March, the "deemed granted" provision again came into play. Verizon had filed a petition for forbearance concerning high capacity services. Due to a vacancy, the FCC had only four Commissioners and could not reach a majority determination on whether to grant or deny the petition. As a result, we were unable to issue a decision by the statutory deadline and the petition was deemed granted by operation of law. Some of Verizon's competitors have petitioned for review of this grant, and those petitions are currently pending in the D.C. Circuit. This case raises many unique issues, including whether the court has jurisdiction to review the grant by operation of law since there is no Commission order to review. The outcome of this case, however, should give you plenty to talk about at next year's conference.

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As you can see, the Commission faces many challenging issues as we try to keep up with an industry that is experiencing revolutionary change. I thank you for allowing me to share with you some of my thoughts on these issues and look forward to answering any questions you might have.