Keynote Address of FCC Commissioner Robert M. McDowell
2008 Quello Communications Law and Policy Symposium
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Thank you, Chairman Wiley, for your kind introduction. Thanks to you and all of the folks at the Quello Symposium for asking me to join you. I am delighted to be part of your program.

What your program reflects, in my view, is the reality that we live in the most dynamic and exciting time in the history of the media industry. The media content we viewed as children, through a small number of local stations, has exploded into exponentially more diverse and interesting programming that is now available through a dizzying array of platforms. When I was young, there were four main channels on the dial – CBS, ABC, NBC and PBS. In the years since, competition has emerged in the form of new broadcast networks such as FOX and the CW. New cable networks have sprouted up to the point where we now have well over 500 programmers, with substantially fewer of them - under 15 percent - vertically integrated with a cable company than in 1992. Back then, cable owned 57 percent of the 100 or so national programmers. New programming is also being created for websites, cell phones, iPods, and even the stairmaster at your gym. The nimble entrepreneurs that have invented, built and filled these pipes are producing more disruptive and positive technological change than we have ever seen. As a result, consumers have more choices than ever before.

And that's a good thing because consumers expect to be able to pull the content of their choice at the time and place of their choosing. Internet usage is increasing at an astounding rate, as viewers continue to seek alternatives to their TVs. Just last week, comScore reported that

U.S. Internet users viewed more than 10 billion online videos in February alone, representing a three-percent gain over January despite February being two days shorter. But more importantly, that figure is a 66 percent gain over February 2007. Nearly 135 million American Internet users spent an average of 204 minutes per person viewing online videos in February. Google sites, such as YouTube, attracted the most eyeballs – pulling in 81.8 million viewers. Given this growth, it's no wonder that YouTube consumes more bandwidth than the entire Internet did in 2000.

More amazingly, 72.8 percent of the total U.S. Internet audience viewed online video. The average viewer consumed 75 videos and the average video duration was 2.7 minutes. comScore also found that the Internet has surpassed television in the number of gross advertising impressions served, now delivering 50 percent more ratings points than television, although the Internet commands a lesser share of the advertising marketplace… for now.

In the meantime, the Internet is going wireless. In just 26 years since its invention, half of the world's population – 3.3 billion people – now have a cellphone. But yesterday's cell phone is today and tomorrow's personal portable broadband device. According to the FCC's latest report, wireless broadband penetration is increasing at a staggering rate of 730 percent per year through the end of 2006. Consumers want more and more content on their wireless devices.

As technology and consumer tastes rapidly change, traditional media companies are trying to adjust their businesses in an effort to retain and grow their audiences. In fact, a motto of this new media marketplace could be, "innovate and adapt, or die." An example of such adaptation is Americans' changing viewing habits of March Madness. In 2003, CBS launched its "March Madness on Demand" video player as a pay service, charging between $9.95 and $19.95 to users. In its best year as a pay service – 2005 – the player attracted an audience of

only 25,000 viewers. But since CBS decided to adapt to evolving consumer preferences and open up its platform for free, it has enjoyed tremendous success. From the opening day of this year's NCAA tournament through the championship game 62 games later, 4.75 million total unique visitors watched the games on the video player. That's 164 percent growth over 2007. Those viewers watched over 4.9 million total hours of hoops online. So the real question is: is anyone in America getting any work done during March Madness?

The broadcast networks are also making full episodes of their shows available online to meet consumer demand, threatening same-season reruns with obsolescence. ABC's online contributions include hit shows such as "Lost," "Grey's Anatomy" and "Ugly Betty." As of March 2, 2008, there have been over 290 million episodes initiated on ABC.com's full episode player since the player became a permanent fixture on the network website in September 2006. Such numbers have the potential to put more eyeballs in front of ads, and more money into writers', producers' and actors' pockets.

Not only are the networks putting their popular shows online, but they are also reconsidering standard business models in other ways. The Open Mobile Video Coalition, formed by several major broadcasting groups, including public television, announced last week at the National Association of Broadcasters show that the industry is on track to develop standards and launch services for *live* mobile digital television in 2009. The goal is to launch full-motion, local broadcast TV on mobile and handheld devices, such as cell phones, laptops and PDAs. PBS also has been a leader in the quest to adapt. The Association of Public TV Stations early on reached deals with NCTA and DirecTV for carriage of multiple streams of digital TV programming from their stations. According to PBS, these deals will "stimulate the creation of a new generation of content and services from public television." And perhaps it is

obvious to say that today's video market will only become more competitive as broadcasters beam new HDTV and multi-cast video programming, over-the-air, for *free* – in direct competition against cable and satellite.

Clearly, our "new media economy" is a new world for consumers, and for traditional media networks and broadcasters as well. So why are policymakers like us at the FCC dusting off decades-old regulations to impose on broadcasters? Why are we considering placing these proverbial albatrosses around the necks of traditional media precisely at this "tipping point" in history when they can least afford a regulatory disadvantage vis-à-vis unregulated platforms like the Internet? Must policy makers in Washington continue to thicken the lines between silos and then squeeze new technologies and old regulations into them, all in an age where the lines among our TVs, computers, cell phones and other gadgets are blurring?

For example, in November, the Commission adopted an order requiring "enhanced disclosure" by TV stations regarding their efforts to ascertain the programming needs of various segments of the community. A new standardized form requires a list reporting all programming aired in various categories such as local news, local civic and electoral affairs programming, religious programming, programming aimed at underserved communities, independently produced programming and so forth. Having a flashback? I cast a dissenting vote against this new form because it raises the specter of several archaic regulations that the Commission should not reinstate.

Between 1973 and 1984, when the FCC's ascertainment policy was in effect, stations had to maintain profiles of the demographic and population aspects of their communities, consult with leaders of significant community groups and the general public, and report the programs they aired to serve those populations. When stations applied for: license renewals, new stations,

or major changes to existing stations, FCC staff would review stations' ascertainment filings. Staff kept checklists of the requirements and would call stations to "suggest" which community groups they should have discussions with about programming. The potential Orwellian implications of such policies are chilling.

The Commission eliminated ascertainment requirements for television and radio stations in, ironically, 1984 after a thorough examination of the broadcast market, finding that "market incentives will ensure the presentation of programming that responds to community needs and provide sufficient incentives for licensees to become and remain aware of the needs and problems of their communities." Given this conclusion, the FCC discarded its ascertainment rules in favor of a quarterly issues/programs list to be submitted to the Commission. If market incentives were sufficient in 1984 to motivate broadcasters to stay in touch with their communities, today's much-more competitive market will certainly drive stations to respond to local interests. Localism is the market advantage that broadcast stations have over other programming competitors. Although the November order falls short of reinstating the ascertainment procedures, why is the Commission going back in time to dig up regulations that only made sense in a broadcast-dominated media market? Doesn't Section 202(h) of the Act compel us to move in a de-regulatory direction as competition grows?

I also question the need for government to use the new Form 355 to foist upon local stations its preferences regarding categories of programming. Although the Commission has not mandated certain types of programming, we are regulating with a wink and a nod by requiring lists of such programs. Why does the FCC need a list of the religious programming aired on a station? Why do we require a list of all local civic affairs programming? Why do we need to know whether it was locally produced or part of a regularly scheduled program? While we stop

short of requiring certain content so far, we are headed on a collision course with the First Amendment rights of broadcasters.

Form 355 also requires broadcasters to report the amount of independently produced programming that is aired on each station. Independently produced, however, is defined as programming

> that is produced by an entity not owned or controlled by an owner of a national television network, including but not limited to ABC, CBS, NBC, and FOX. If an owner of a national television network owns or controls more than a one-third financial interest in the program, acts as the distributor of such program in syndication, or owns the copyright in such program, the owner of a national television network will be considered to be the producer of that program.

Having another flashback? This language is all too reminiscent of the financial interest and syndication rules – the "Fin-Syn rules" that the Commission adopted in 1970 and that the Second Circuit Court of Appeals struck down in 1992 because of the major changes in the structure of the television industry in the intervening years.

The Fin-Syn rules were an attempt to increase programming diversity and limit the market power of the then-three broadcast TV networks over TV programming. The rules prohibited a network from syndicating programs it produced itself and from purchasing syndication rights to programs it bought from outside producers, or otherwise obtaining a financial stake in those programs. The concern was that the networks, through their dominant distribution system of owned and operated stations and affiliates, would also seize a dominant position in the production of programs. The rules protected independent producers from being pressured into giving up syndication rights in exchange for a first run on one of the big three networks, and protected independent stations from having to purchase reruns from the networks.

When the Second Circuit struck down the Fin-Syn rules in 1992, the court found that the structure of the TV industry had "changed profoundly" since the rules were promulgated. Specifically, the court recited the following changes:

> The three networks have lost ground, primarily as a result of the expansion of cable television, which now reaches 60 percent of American homes, and videocassette recorders, now found in 70 percent of American homes. Today each of the three networks buys only 7 percent of the total video and film programming sold each year, which is roughly a third of the percentage in 1970…. And each commands only about 12 percent of total television advertising revenues. Where in 1970 the networks had 90 percent of the prime-time audience, today they have 62 percent, and competition among as well as with the three networks is fierce. They are, moreover, challenged today by a fourth network, the Fox Broadcasting Corporation, which emerged in the late 1980s.[1]

Even more profound changes have occurred since 1992. Today, the average consumer has a choice of at least three subscription video providers, and sometimes five. Cable companies pass over 92 percent and serve approximately 60 percent of households. DirecTV and Echostar, the DBS operators that have arrived on the scene since 1992, serve over 30 million consumers and have grown to a 30 percent market share among MVPDs. Now phone companies are in the video business too. Videocassette recorders have been replaced by DVD players, DVRs, game consoles and on the near horizon, home networking systems. The reach of the broadcast networks has fallen far below the 62 percent of the prime-time audience cited by the court in 1992. During the current season, the combination of 77 ad-supported cable networks posted higher ratings among the key 18 to 49 demographic than the broadcast networks, according to recent analysis from the Cable Television Advertising Bureau. In 1992, there was no public Internet, let alone Internet video. And new ventures such as Joost, Cinema Now, Movielink and others allow consumers to avoid traditional subscription video paradigms altogether.

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[1] *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1046 (2nd Cir. 1992).

With respect to the programming market, new ideas abound as well. Last November, NBC announced a first-of-its-kind deal to buy an Internet series called “Quarterlife” for distribution as an hour-long drama on its stations after it has first played in eight-minute segments on several websites. Also, earlier this month, DirecTV and NBC struck a novel deal that will keep the critically-acclaimed, but low-rated, drama “Friday Night Lights” on the air. DirecTV will help pay for the show’s production costs in exchange for the right to premiere the show first to DirecTV subscribers. It will run on NBC four months later.

Furthermore, through dynamic new programming ideas and media platforms, the market is delivering its own a la carte video offerings, without the “help” of the government. I doubt that streaming video of prime-time’s most popular shows, companies with business models like NetFlix and Vudu, and websites like Hulu and Joost would exist today if the government had tried to engineer them through regulation. If the government starts imposing mandates regarding à la carte, will the result be that consumers will pay more and get less? Why should government consider imposing such a mandate when the market is providing per-episode a la carte already?

At the end of the day, we must keep in mind that we live in an exciting, market-driven, on-demand world that empowers all of us as consumers. As technologies and consumer habits continue to evolve, we should proceed with a healthy skepticism of regulation. Simply put, government cannot outsmart an unfettered and competitive market. The better course is to equip the private sector with the freedom and flexibility necessary to resolve challenges and satisfy consumer demand on its own, while remaining vigilant - and ready - to jump in to resolve genuine harms that cannot be addressed any other way.

Thank you again for hosting me today. I’m pleased to take a few questions.