

**Remarks of the Honorable Robert M. McDowell
Commissioner, Federal Communications Commission
before the
Federal Communications Bar Association
Monday, February 2, 2009
12:00 p.m.
Capital Hilton Hotel**

Thank you, Mark, for your kind introduction. Thank you also for inviting me to speak with you today. It's wonderful to be back at the FCBA. Many thanks for all that you do, and I'd especially like to thank Stan Zenor for all of his hard work on behalf of the FCBA.

I see we have some special guests in the audience. They should look very familiar to all of you. In reverse order of seniority, first let's all give a warm FCBA welcome to my friend and colleague Commissioner Jonathan Adelstein. And, in his first appearance before the FCBA as Acting Chairman of the FCC, let's give a rousing congratulatory welcome to my distinguished friend, Mike Copps. Congratulations again, Mike, on being named to that post.

On a scale of one to ten, I'd rate his first few days as Chair as an 11. Chairman Copps acted swiftly to open up lines of communication not only with his fellow commissioners and outside parties but, more importantly, with every employee of the FCC. I have sensed an immediate boost in morale as a result. In his address to all FCC employees last week, he eloquently crystallized several of the ideas many of us have been thinking about for some time. As he implied then, no one should have exclusive ownership of ideas regarding FCC reform. Or to paraphrase President Ronald Reagan, it is amazing what you can accomplish if you don't care who gets the credit. And Mike, I bet it's not often you get compared to President Reagan, but in this context, I hope you'll take it as a high compliment.

But before I get into the heart of my remarks on FCC reform, I'd like to discuss briefly the more urgent issue of the digital television transition. It looks as though Congress will try

again later this week to pass legislation to push back the analog cut-off deadline to June 12. If and when a new bill is signed into law I know that my colleagues on the Commission and I will work diligently to implement it. In the meantime, it is important for all of us to stay focused on February 17 regardless of what Congress does or does not do. Most broadcasters are prepared to shut off their analog signals on that date, and an estimated 392 stations have either already converted to all-digital or will do so by February 17. Broadcasters have invested hundreds of millions of dollars in new DTV equipment in the past few years in reliance upon the February 17 deadline. On top of that, broadcasters have been incurring additional costs to broadcast in both analog and digital. If government is going to change the rules of the game with precious few minutes left on the clock, I hope that the Commission will be afforded some flexibility in allowing broadcasters to go all-digital on February 17, or before June 12, provided they have been acting in good faith and both their viewers and the Commission have been properly notified. I also hope that the Commission would be given the resources it would need to carry out any new mandate.

At the same time, we should be frank with the American public and get the word out that many TV viewers will be left behind regardless of when the cut-off date is. I know that Chairman Copps, Commissioner Adelstein and I will do all that we can to minimize the inevitable collateral damage this transition will cause.

In the meantime, let's all stay on message: if you need a converter box, get it today and hook it up today and start enjoying the benefits of digital television today.

Now, back to FCC reform. I could think of only one audience on the planet that I could give this speech to, and that is the FCBA. I come to you today not only as a

commissioner, but as a FCBA member and former practitioner. As you know, Chairman Copps and I have been corresponding with open letters setting forth some ideas on improving the public's ability to participate in the FCC's work, as well as its overall decision-making abilities. After many conversations with him and Commissioner Adelstein, I'm confident that we all share the goals of: boosting employee morale; promoting greater transparency; creating a more informed, collaborative and considerate decision-making process; and encouraging meaningful and effective public comment. We all have an interest in advancing the timely and orderly resolution of Commission business.

So, let's talk about some ideas.

As a first step, I recommend that we commence a thorough operational, financial and ethics audit of the Commission and its related entities, such as the Universal Service Administrative Company and the Federal Advisory Committees. As with all reform endeavors, I hope that all of the commissioners would be involved in this process, including its development and initiation. A couple of folks have expressed their concern over my use of the word "audit." I certainly did not intend for that to be a scary word. What I mean by an audit is something akin to a due diligence review of a company as part of a proposed M & A, or after a change in top management. It doesn't have to take a lot of time. After this type of review, we should be able to answer the questions: What is the current condition of the FCC and its related entities? How do they operate? The purpose wouldn't be to initiate a witch hunt against anyone or anything. I'm not seeking to abolish USAC or FACs, for instance. I'm merely seeking to take the first step on the road to improving the agency.

During the review, we should seek comment from the public and the Commission staff, and we should provide Commission employees with an opportunity to submit comments

anonymously. I also propose that we hold a series of “town hall” meetings at the FCC’s Washington headquarters, at a few field offices, as well as in a few cities around the country for the general public to attend. In fact, maybe we can start the first such “town hall” meeting here today at the conclusion of my remarks. All of us might find it cathartic. This could be the beginning of the first FCC “wiki” that we all shape and share.

As part of a financial review, it is crucially important that we examine the Commission’s contracting process, as well as the processes relating to the collection and distribution of administrative and regulatory fees currently conducted exclusively by the Office of Managing Director. For instance, we should consider whether the full Commission should receive notice prior to the finalization of significant contracts or other large transactions.

In the same vein, it is time to examine the Commission’s assessment of fees. Regulatory fees are the primary means by which the Commission funds its operations. You may not know it, but the FCC actually makes money for the tax payers. Our methodology for collecting these fees may be imperfect, however. At first blush, it appears that we may have over-collected by more than \$10 million for each of the last two years. Some have raised questions regarding how the fee burden is allocated. Our recent further notice of proposed rulemaking could lead to a day when we can be sure that we have a methodology that lowers regulatory fees and levies them in a more nondiscriminatory and competitively neutral manner.

We should also work with Congress to examine how the Commission continues to collect administrative fees under Section 8 of the Act. Let’s take another look at why we continue to levy a tax of sorts of allegedly \$25 million or so per year on industry, after the

Commission has fully funded its operations through regulatory fees. That money goes straight to the Treasury and is not used to fund the agency. Every year, we increase those fees to stay current with the Consumer Price Index. Why? Our regulatees pass along those costs to consumers and they are the ones who ultimately suffer from unnecessary fee collection.

Furthermore, we should examine the financial management of the universal service fund. Our Inspector General reported last year that the estimated erroneous payment rate for the USF High Cost Program between July 2006 and June 2007 was 23.3 percent, with total estimated erroneous payments of \$971.2 million. How and why did that happen? I'm delighted that OIG caught it, but why did that happen to begin with?

In the same spirit, an ethics audit should ensure that all of our protocols, rules and conduct are up to the highest standards of government best practices. Faith in the ethics of government officials has, in some cases, eroded over the years and we should make sure that we are doing all that we can to maintain the public's trust.

Also in connection with this review, I hope that we can work together to update and re-publish the Commission's strategic plan. As we toil on day-to-day tasks, it can be easy to lose sight of our strategic direction. A review and update could help sharpen our focus and put a spring in our step not to mention demonstrate our commitment to transparency and an orderly process.

The findings of our review, combined with our work to develop a new strategic plan, would provide us with the information and ideas necessary for considering a potential restructuring of the agency. As you know, the Commission has been reorganized over the years – for instance, the creation of the Enforcement Bureau under Chairman Kennard and the Public Safety and Homeland Security Bureau under Chairman Martin. Close coordination

among the staff in pursuit of functional commonality historically has improved the Commission's effectiveness. Nonetheless, the time is coming again to reconsider this option. Make no mistake: I am not suggesting that we make change for the sake of change. But the agency needs to be flexible and efficient if we are to serve the American people effectively.

I understand and respect Chairman Copps' preference to wait for a permanent chair to lead the effort to tackle the issue of restructuring, but I hope there is no harm in starting to talk about such tasks now.

There are, however, steps we may want to take to maximize our efficiency. Given today's economy, it is more important than ever that the Commission use all of its resources to improve taxpayer value. For example, I share and applaud Chairman Copps' view that we delegate some authority back to upper and mid-level management. We ought to have the confidence in our deputy bureau chiefs and division chiefs to provide them with authority to handle routine matters, conduct meaningful *ex parte* discussions and generally discuss their subject areas with anyone, including commissioners, without prior approval from the head of the agency.

As Chairman Copps emphasized, the Commission's most precious resource, really our only resource, are its people. Many of our most valued team members are nearing retirement age. We need to do more to recruit and retain highly-qualified professionals to fill their large shoes. I hope our next budget will give us adequate resources to address this growing challenge.

Similarly, I am hopeful that we will make more efficient use of non-attorney professionals, such as engineers and economists. For example, there is no reason why we cannot use engineers to help investigate complaints and petitions that involve technical and

engineering questions. This would be especially useful as we continue to consider matters pertaining to network management.

We can all agree that the Commission could improve external communications. This is especially true with respect to process. Luckily, there is some low-hanging fruit. As a first step, I suggest that we establish and publish Open Meeting dates for the entire 2009 calendar year. I greatly appreciate Chairman Copps starting us off on the right foot by posting the meeting dates through the first quarter. Perhaps once we get a permanent chairman, the public, the staff, the bar and the media who cover us, would greatly benefit if we would provide at least six-months advance notice of meeting dates for 2010 and beyond.

In addition, I propose that we create, publish on the website and update regularly an easy-to-read matrix setting forth a listing of all pending proceedings and the status of each. This matrix would include those matters being addressed on delegated authority. The taxpayers should know what they are paying for.

Similarly, I suggest that we establish and release a schedule for the production of all statistical reports and analyses regularly conducted by the Commission, and publish annual updates of that schedule. This would include, for example: the *Wireless Competition Report*, which has traditionally been released each September; the *Video Competition Report*, which until recently, was released at the end of each year; and the *High-Speed Services Report*, which, at one point, was released biannually. The goal here would be not only to ensure that the public is fully aware of what we are working on and when, but also to give these valuable analyses to their owners – the American people – with regularity.

We also need to overhaul our internal information flow, collaboration and processes. Chairman Copps, Commissioner Adelstein and I are working together to identify and

implement measures to increase coordination among the commissioner offices, between commissioner offices and the staff, as well as among the staff. In fact, our senior advisors all met with the Commission's senior staff this morning. It is important that we cooperate with each other to foster open and thoughtful consideration of potential actions well before jumping into the drafting process. The bottom line is simple: No commissioner should learn of official actions through the trade press. We could call this our "leave no commissioner behind" program.

Since arriving at the Commission, I have operated under the firm principle that the FCC is an independent agency and each commissioner should always vote his or her conscience, independently. At the same time, Section 5 of the Communications Act provides that the chair acts as the chief executive officer of the Commission, and, therefore, has responsibility for setting the agenda. However, a CEO has a board of directors, in this case the other commissioners, and an associated fiduciary obligation to consult with and report to his or her board. Likewise, all members of the Commission have a duty to the organization, and each has one vote. The Act makes clear that no one vote is weighted more heavily than another. In light of this statutory structure, thorough, honest and unfettered communication and thoughtful cooperation should usually yield positive results. As with the private sector, bottlenecks, information hoarding and opaque management styles can stifle innovation and efficiency. As a result, the public interest can be harmed.

In contrast, an effective FCC would be one where, for instance, Commissioner offices would receive options memoranda and briefing materials long before votes need to be cast. And, again, I'd like to praise Chairman Copps for his efforts to make that happen. For all rulemakings, within 30 days of a comment period closing, perhaps all commissioners could

receive the same comment summaries. And maybe, notices of proposed rulemakings could sometimes actually contain proposed rules. Maybe within a fixed timeframe after receiving comment summaries, say 60 to 90 days, all commissioners could receive options memos complete with policy, legal, technical and economic analyses. In preparation for legislative hearings, it might be helpful if all commissioners received briefing materials, including witness lists, at least five business days prior to the hearing date. For FCC *en banc* hearings or meetings, I'd appreciate it if all commissioners received briefing materials at least one week prior to the event date. The details here are less important than the upshot: to echo Chairman Copps, all commissioners should have unfettered access to the agency's experts, and receive the benefit of their work.

In the same spirit, it might help us reach legal conclusions better if we were to require the bureaus and offices to seek legal advice from the Office of the General Counsel at the early stages of, and throughout the drafting process. Rather than slow the process, I believe this would shorten the process – after all, we would be capitalizing on our in-house expertise early and often. Taking such precautions might also bolster the Commission's track record on appeal. Indeed, this type of close collaboration might lead to more logical, clear and concise policy outcomes that better serve the public interest.

As part of these communications improvements, I suggest that we update the Commission's licensing databases, IT and web systems. We are overdue for an upgrade. Well-organized and user-friendly information systems will ensure that all public information is available, easily located and understandable. And, I recommend that we update the General Counsel's part of the website to include litigation calendars, as well as access to pleadings filed by all the parties. I also wonder whether our customers would prefer that licenses of all

stripes be housed in one database, rather than separate databases spread across the stovepipes of our several bureaus?

Another idea, which I hope will have particular appeal to the current and former FCC employees is to update and rewrite our guide to the Commission's internal procedures, currently entitled *Commissioner's Guide to the Agenda Process*. For instance, I propose that we undertake a thorough review of the physical circulation process, including identifying and making changes to reduce the amount of paper unnecessarily distributed throughout the agency. Current procedures require that each office receive about eight copies of every document on circulation when one or two would suffice. I also wonder why our procedures mandate delivery of 30 paper copies of released Commission documents to our press office. The overwhelming majority of reporters who cover our agency pull the materials they need from our website. Perhaps this is another area where we could save money and help the environment all at the same time.

I'm starting to get into some real inside baseball here. But perhaps we could revamp and tighten the process for 8th floor offices' approval of FCC documents once they are adopted. Now that you've eaten, I can let you in on some inside FCC lingo. This system is known to insiders as the Bureau Agenda Release Form process – the acronym for which is B-A-R-F or “BARF.” Anyway, the goal would be to provide offices with a meaningful opportunity to review documents prior to release, to reduce the need for issuing *errata*. Similarly, let's examine the process for releasing documents approved by the commissioners. In recent history some have been delayed, while others have not.

Finally, on a more “macro” level, I propose that the commissioners work together to build an ongoing and meaningful rapport with other facets of government, especially in the

consumer protection, homeland security, and technology areas. Each of us should be able to collaborate and coordinate with the appropriate experts and decision makers across every branch of government regardless of function or political affiliation.

Well, I sort of feel like I've been sitting on Santa's knee giving him my geeky FCC reform wish list. Nonetheless, I am eager to work closely with the Obama Administration, Congress, FCC employees, FCBA members, consumer groups and all interested parties to improve our agency. I again applaud Chairman Copps' actions thus far.

So, in the spirit of working toward a reinvigorated FCC, I'd like to kick off our FCC "Wiki," hear your views and open the floor to a free-flowing discussion.