Remarks of Commissioner Robert M. McDowell

Virginia Association of Broadcasters
73rd Annual Summer Convention

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As prepared for delivery

Thanks, Doug, for your very kind remarks. I'm pleased to join you in marking an historic moment: the 73rd time that broadcasters in the Commonwealth have come together to share ideas about what remains one of the most fascinating and compelling mediums ever invented. As a history lover and proud Virginian, I couldn't resist the excuse provided by this gathering to dig up some facts about the broadcasting industry at the time of your first convention.

According to FCC records, in 1937 there were just 12 stations licensed in Virginia, so that first summer gathering must have been a bit small. But those pioneering broadcasters apparently were a hardy band, for eight of those stations – all radio of course – remain operating today under the same call sign and in the same city of license. And they were growing in popularity. Available statistics indicate that the percentage of "radio families" in Virginia jumped from about 59 percent in 1935 to more than 65 percent at the end of 1937.

Data for that year also contain several "déjà vu all over again" nuggets of information that may strike a chord with you today. For example:

- Although television was still in the testing phase back then, the big news in that arena in 1937 was the move to a higher-resolution picture quality – which a leading set manufacturer was happy to show off to the media.

- Broadcasters were embroiled in copyright disputes with performing artists, with popular musicians such as orchestra leader Fred Waring leading the charge.

- Key court decisions out of the D.C. Circuit made clear that the Commission could not treat broadcast stations as if they were nothing but public utilities and that the agency should consider marketplace conditions in its licensing decisions.

- And, finally, President Roosevelt appointed a new chairman of the FCC with instructions to reorganize the agency because it wasn't working as well as it should.

As much as I love to talk about history, however, I don't mean to imply that broadcasting is a creature of the past. To the contrary, broadcasting remains a vital, heavily used and very dependable source of news, information, and entertainment for millions of Virginians and hundreds of millions of Americans. I'll spend a bit of time now on three regulatory issues of the moment for broadcasters – TV spectrum reallocation, retransmission consent and the media ownership rulemaking. I look forward to your questions.

Broadcast Spectrum

The television broadcasters among you are well aware that the National Broadband Plan has recommended that the Commission reallocate 120 MHz from the TV band to wireless broadband uses. Keep in mind that the commissioners did not vote on the Plan. Instead, it was the work product of a special team of staffers who toiled for an intense but relatively short period of time. That said, I am interested in exploring the possibilities for a voluntary transfer of some broadcast spectrum to wireless broadband uses, as long as it is truly voluntary.

The spectrum reallocation concept obviously raises several legal, technical and policy issues that must be explored through the notice-and-comment rulemaking process. Moreover, the "incentive auction" idea at the center of this spectrum initiative in my view may require an act of Congress. But I am eager to hear the legal arguments on both sides of that question. In other words, we have a way to go before anything concrete can happen.

Action at the Commission is beginning, however. Even as I speak, a diverse group of engineers is gathering in Washington for a day-long "Broadcast Engineering Forum." They are

tackling several issues, including methodologies for "repacking" the TV band, improving VHF reception and advancements in compression technologies. No one expects them to resolve all the pending questions, but the discussion should help inform a new rulemaking proceeding that Chairman Genachowski has said he hopes to kick off in the third quarter of this year.

In addition, the broadband team staffers released a "Technical Paper" that puts more flesh on the framework of their proposal. I encourage you to read it and give us your perspectives on the ideas in it, which include:

- First, a new and not-yet-perfected method for optimizing channel allotments;
- Second, the concept that the Plan has named "channel sharing," which calls for broadcasters to pair up and split the usage of one 6 MHz channel with, presumably, separate licenses for each broadcaster; and
- Third, different options for designing incentive auctions to lead to voluntary relinquishment of some broadcast spectrum. At least one of these options might not require statutory changes. It calls for auctioning "overlay" licenses in the TV band for broadband uses, declaring such uses "co-primary" with broadcasting, and leaving much of the work of negotiating band-clearing to the broadcasters and new licensees.

These are only a few of the key ideas in the Technical Paper. The document also provides insight on how the broadband team decided that it would be possible to derive as much as 36 out of the targeted 120 MHz from changes to the interference and allocation rules. And it shows why, from a financial standpoint, the major effects of any reallocation of TV spectrum to broadband uses likely would occur only in or around major metro areas – because those are the places where the economics would make the most sense.

In addition, the Technical Paper clarifies that reallocation and repacking should happen only once, at the end of any incentive auction process that may come to pass. You may recall that the Plan itself suggested the possibility of two repackings, one after interference rule changes and another after incentive auctions. Like you, I'm a veteran of the recent DTV

transition, and so the idea of *two more* mini-transitions makes me a bit queasy, but I'd like to hear the thoughts of all stakeholders. The Technical Paper does recognize that the consumer disruption and station expense associated with repacking will require "significant effort on the part of the FCC and broadcasters."

The Technical Paper does not address the possibility of what may occur in the future if voluntary efforts do not yield something close to 120 MHz for broadband. That's all the more reason for wanting your expert advice now on the various ideas for voluntary measures. I hope you will take time this summer to evaluate the options in depth so that you can respond with hard facts and figures in the upcoming rulemaking comment cycle.

I also hope the FCC will receive guidance from Congress on the issues. I agree with those Members who already have advised us to work closely with the Hill in moving forward with any plan for reallocating the TV spectrum. Additionally, I would like the Commission to seriously explore the options that already exist under current law for broadcasters to lease spectrum for "ancillary and supplemental" uses such as wireless broadband.

Retransmission Consent

Turning to another topic, let me touch briefly – and with apologies to the radio broadcasters in the audience – on another TV topic: retransmission consent. I'm sure that the TV broadcasters among you are aware that the Commission has called for public comment on a petition filed in March by a group of "multichannel video programming distributors" or "MVPDs," including cable operators, and satellite and telco TV providers, as well as some advocacy groups.

The "retrans" petition focuses specifically on the negotiation process. Although these private-party negotiations eventually lead to carriage deals being struck, at least in all cases of

which I'm aware, the petition was filed in the wake of several down-to-the-wire negotiations over the last six months. The petitioners have asked the FCC to open a rulemaking to consider a range of procedural and substantive changes to the retrans process, including the possibility of requiring arbitration and imposing interim carriage while disputes are being resolved.

In my view, the Commission should think twice before taking any action that may interfere with private contracts regarding the carriage of broadcast programming by multichannel video programming distributors. Among my concerns is our statutory authority in this area. Section 325 of the Communications Act explicitly directs us to act only to preserve "good faith" in the bargaining process, and does not require any particular outcome. The statute also plainly states that merely asking for more money does not constitute bad faith.

Moreover, from a policy perspective, the correlation between retransmission consent fees and higher cable prices for consumers is unclear. According to at least one study of relatively recent vintage, only one-third of a consumer's cable bill is attributable to programming costs and less than two percent of that bill is attributable to retransmission consent fees.

The formal comment period on the petition has just closed, and my legal team and I are reviewing the submissions and meeting with interested parties. Given my questions about the Commission's current power to act in this area, I look forward to any guidance that Congress may provide. In the meantime, the petitioners are asking the Commission to issue a notice of proposed rulemaking, so I doubt that we have heard the last about this issue.

Media Ownership

Finally, let me touch on an area that may interest radio and TV broadcasters alike: the 2010 round of our media ownership review. Our recently issued "Notice of Inquiry," or "NOI," outlines many of the difficulties that the regulated media face as they transition into the digital

media era. Broadcast stations and daily newspapers are grappling with contractions in audience and circulation numbers, advertising revenue and jobs as online sources – both those of competitors and their own – attract an ever-growing degree of attention. The strides that you and others are making in the online space are creative and exciting, while the future evolution of sustainable business models is hard to predict. The ad revenue dollars from yesterday's business models have turned into mere pennies in the business models of today. It is a tense time as the market tries to find ways to fund quality newsgathering, sports and entertainment.

Today's mix of promise and uncertainty leads me to think of this time as the adolescence of digital media. However the future may play out for individual entities, I am confident that participants in the media marketplace as a whole will figure out ways to survive and prosper. My job at this juncture, I believe, is to try to keep Washington out of your way as much as possible while you figure out what works. Journalism *especially* does not need the government's "help."

The Commission has known since at least the time of its 2002 ownership review that the Internet would have a profound effect on the media landscape, yet for various reasons the agency has been unable to fully adapt its regulations to the new realities. I hope that this time we will get it right. Broadcasters, as well as daily newspaper publishers, have been laboring under burdensome rules that have remained essentially intact for more than a decade. Outdated restraints should not be allowed to continue impeding your ability to reshape your destiny in today's rapidly evolving media environment.

Possible relaxation or elimination of the existing rules does not necessarily mean that we will see a new wave of ownership consolidation. To the contrary, recent history has illustrated that modernizing FCC regulations may be meaningless because traditional media owners now

prefer to spend their time and resources on new, unregulated outlets rather than acquire any more of the heavily regulated ones. In short, a market that once experienced media consolidation has now become one of media divestiture. Yet even as this trend continues, the Commission has no excuse for continuing to cling to inaction. We have a statutory obligation to eliminate unnecessary mandates and bring our regulations into line with the modern marketplace.

I hope that many of you are working to craft the best possible comments under the relatively tight deadlines that the NOI imposes. It's true that we have a number of steps to complete after we receive your comments, including releasing ownership studies for public critique and calling for yet more comment on a Notice of Proposed Rulemaking that I hope will actually contain the text of proposed new rules. Still, this stage of the rulemaking process may be your best shot for making the case that the current restrictions need substantial amendment – and to detail precisely what kind of changes we should make.

Although I voted in favor of issuing the NOI, I find some of its premises and questions disquieting. I am concerned, for example, by the NOI's suggestion that the Commission might attempt to use measures of "civic engagement," such as voter turnout data or citizen knowledge of government officials and issues, to evaluate the degree to which broadcasters in a particular market are fulfilling the agency's localism goal. The possibility of the government monitoring political speech – core protected speech under the First Amendment – should send shivers down the spine of anyone who cherishes liberty. But, obviously, the Commission employs at least a few people who are interested in this idea, as illustrated by the fact that one of the new studies that the agency hopes to commission calls for such a "civic engagement" analysis.

I similarly question the NOI's suggestion that the Commission should focus on counting the number of journalists employed at broadcast stations. In a free society, the government has

no business attempting to influence the Fourth Estate watchdogs of state action, whether the ostensible impetus is good or bad. The practice of journalism, a constitutionally recognized freedom, is better off without Big Government offering the "helping hand" of state intervention.

But I am pleased that the NOI asks a few questions about the legal precedent in the media ownership arena and how those court decisions may affect the scope of the Commission's decision-making now. I expect that some commenters will draw upon the data and arguments they submitted a few weeks ago in the U.S. Court of Appeals for the Third Circuit. That court finally has turned to the substance of pending legal challenges to the Commission's last ownership decision, which the agency voted on way back in December 2007. The appellate proceeding is moving on a separate but somewhat parallel track, and the court may act in time to inform our 2010 rulemaking effort. Whether it does or not, however, it is high time for the FCC to press ahead with its 2010 review.

With that, let me stop here and turn the direction of this conversation over to your questions.