

**STATEMENT
OF
COMMISSIONER ROBERT M. McDOWELL
FEDERAL COMMUNICATIONS COMMISSION**

**BEFORE THE
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
COMMITTEE ON ENERGY & COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES**

MAY 13, 2011

Thank you, Chairman Walden and Ranking Member Eshoo, for inviting me to join you today.

As you know, Congress created the FCC in 1934, almost 77 years ago. In that year, Babe Ruth signed a contract for an “eye-popping” \$35,000 a year. Donald Duck made his movie debut. The average new house cost less than \$6,000. The entire federal budget was only \$6.5 billion. And a gallon of gas cost 10 cents. How times have changed. Although a few amendments have been made to the laws the Commission operates under since then, many of the regulatory legacies from 1934 remain in place. The technologies we take for granted in today’s communications marketplace were unimaginable to even the most creative of science fiction writers when existing mandates were written.

Against this backdrop, it is fitting for this Committee to examine ways to reform the FCC to make it more efficient and relevant to modern realities. I operate under the philosophy that Congress should tell us what to do, and not the other way around. Given your solicitation of suggestions, however, I will start by raising several possible statutory changes to improve the FCC before moving on to possible procedural reforms.

Twenty-first Century consumers want to have the freedom to enjoy their favorite applications and content when and where they choose. Whether such material arrives over coaxial cable, copper wires, fiber or radio waves is of little consequence to most consumers so long as the market’s supply of products and services satisfies demand. Legacy statutory constructs, however, have created market distorting legal stovepipes based on the regulatory history of particular delivery platforms. While consumers demand that functionalities and technologies converge, regulators and business people alike are forced to make decisions based on whether a business model fits into Titles I, II, III, VI, or none of the above. As Congress contemplates FCC reform, it

may want to consider adopting an approach that is more focused on preventing concentrations and abuses of market power that result in consumer harm.

Other statutory changes could include modernizing the Sunshine in Government Act to increase our efficiency and spirit of collaboration while preserving openness and transparency.

Furthermore, ideas from outside the Commission also deserve serious consideration. For instance, Randy May, President of the Free State Foundation, has called for building on the deregulatory bent of Sections 10 and 11 from the Telecommunications Act of 1996 by adding an evidentiary presumption during periodic regulatory reviews that would enhance the likelihood of the Commission reaching a deregulatory decision.

Additionally, various statutory provisions require the Commission to file annual reports on various topics; such as, the Wireless Competition Report,¹ Satellite Competition Report,² Section 706 Report,³ and Video Competition Report.⁴ As you would imagine, preparation of each is a monumental and costly undertaking. I would respectfully propose that, rather than requiring that the Commission submit these reports annually, Congress might consider amending the Act to require biennial submissions. For example, filing each sometime within the first quarter of odd-numbered years would allow each incoming Congress to have fresh data at hand for any possible legislative considerations. Moreover, this amendment would remove the Commission from what sometimes seems like perpetual reporting mode.

¹ See The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b), amending the Communications Act of 1934 and codified at 47 U.S.C. § 332(c).

² See Pub. L. No. 109-34, 119 Stat. 377 (2005), which amended the Communications Satellite Act of 1962 and is codified at 47 U.S.C. § 703.

³ See 47 U.S.C. § 1302(b) (2010). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (the Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), codified in Title 47, Chapter 12 of the United States Code. See 47 U.S.C. § 1301 *et seq.*

⁴ See Pub. L. No. 102-385, 106 Stat. 1460 (1992). Congress imposed an annual reporting requirement on the Commission in the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”) as a means of obtaining information on “the status of competition in the market for the delivery of video programming.” See also 47 U.S.C. § 548(g).

With respect to procedural ideas, almost two and a half years ago, I sent to my colleague then Acting Chairman Mike Copps, a public letter detailing some ideas to improve our agency's effectiveness. He and I agree on many reform ideas, such as modernization of the cumbersome and outdated "Sunshine" laws that prevent more than two of us from discussing Commission business outside of a public meeting (as noted above). Shortly thereafter, in July of 2009, after Julius Genachowski became a Commission colleague as well, I sent him an updated letter with additional ideas and suggestions within existing statutory constructs. Time does not allow me to enumerate all of them, so I have attached both letters to this testimony, and I respectfully request that they be made part of the record.

I am delighted to report that some reforms have already been implemented. For example, many stale or ill-advised Commission action items awaiting votes contained on what we call the "circulation list" have been weeded out. A portion of the backlog of the 1.4 million broadcast indecency complaints that were defective on their face has been dismissed. Several of those complaints were older than some of my children, by the way. The FCC now relies more on electronic internal communications rather than paper deliveries. That seems fitting given our agency's mission and name. And a beta version of a new website has been launched. I encourage anyone with an interest in communications issues to take it for a test drive and post your constructive suggestions and comments.

Going forward, I'm hopeful that other FCC reform suggestions will be carried out as well.

- I have long called for a full and public operational, financial and ethics audit of everything connected to the FCC, including the Universal Service Administrative Company (USAC). The erroneous payment rate in the High Cost Fund alone has been far too high, and we may need to make fundamental changes to fix the

problem. Only after a thorough due diligence review, however, will we have the information needed to make an accurate diagnosis.

- Chairman Genachowski has made good progress on ensuring that notices of proposed rulemaking contain actual proposed rules. I applaud his efforts. I would encourage improving the process further by codifying this requirement in our rules. We would all agree that future Commissions, not to mention interested parties, would benefit from the certainty associated with making this change permanent.
- The Commission should include proper market power analyses to justify new rules in notices of proposed rulemaking. If a market power analysis is not appropriate, the FCC should explain why.
- When regulated entities are under scrutiny for alleged violations of our rules, such as broadcasters being investigated for airing indecent material, often they are not notified in a timely manner of the investigation or its effect on other matters before the Commission, such as license renewals. Similarly, entities are not always informed of when they have been cleared of wrong-doing. More transparency and better communication in this area would not only be a matter of appropriate due process, but good government as well.
- To promote collegiality and efficiency, we could improve the productivity of all commissioners' offices by routinely sharing options memoranda prepared by our talented career public servants. All commissioners should be able to benefit from the same advice and analysis enjoyed by our many chairmen over the years. Perhaps we could call this our "No Commissioner Left Behind" program.

- Both the procedural and substantive work product of the FCC’s transaction reviews are in dire need of reform. The Commission should not impose conditions that do not narrowly cure consumer harm arising directly out of the transaction. In the same spirit, the FCC should honor its 180-day merger review shot clock.
- Taking a cue from our colleagues at the Federal Trade Commission, the National Labor Relations Board, the Equal Employment Opportunity Commission, the Federal Energy Regulatory Commission, and the U.S. Commodity Futures Trading Commission, the FCC should post its annual budget, performance and accountability report on the FCC website in a conspicuous manner. Easy access to our budget, the results of our regulatory actions and our financial performance would demonstrate to Congress and the public how the FCC accounts for the resources entrusted to it. Investors receive annual reports from mutual funds and companies in which they invest. There is no reason why the taxpayer should not have access to the same from government agencies.
- Last but not least, we should constantly examine the FCC’s assessment of fees. The good news for the American taxpayer is that the FCC earns its own keep through the collection of fees, fines and auction revenues. The bad news is that the Commission has a history of collecting more in fees than its budget requires. This “tax” of sorts is ultimately paid for by American consumers.

Many more ideas abound, and I look forward to discussing with you all suggestions.

Thank you again for the opportunity to appear before you today.

Exhibit A

Letter from FCC Commissioner Robert M. McDowell to FCC Acting Chairman Michael Copps (January 27, 2009).

Letter from FCC Commissioner Robert M. McDowell to FCC Chairman Julius Genachowski (July 20, 2009).



Office of Commissioner Robert M. McDowell
Federal Communications Commission
Washington, D.C. 20554

January 27, 2009

The Honorable Michael J. Copps
Acting Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Dear Mike:

Once again, congratulations on being named Acting Chairman. Additionally, thank you for your dedication and commitment to public service and the Commission. It goes without saying that I am looking forward to continuing to work with you.

I am greatly encouraged and energized to know that you, Commissioner Adelstein and I will be working together toward the goals of boosting employee morale, promoting greater transparency, as well as creating a more informed, collaborative and considerate decision-making process, all aimed toward advancing the timely and orderly resolution of Commission business. Thank you for addressing these and many other issues within minutes of becoming Acting Chairman. I certainly appreciate the new atmosphere you are creating at the Commission, and I know that the FCC's talented and dedicated career employees appreciate your efforts as well. Accordingly, with the utmost respect for you, the Commission staff and the new Obama Administration, I offer below several preliminary suggestions on achieving the important public interest objectives of reforming this agency. My letter is intended to continue a thoughtful dialogue on moving forward together to improve the public's ability to participate in our work, as well as our overall decision-making abilities. Our collaborative efforts to rebuild the agency should not be limited to the thoughts outlined in this brief letter. As you and I have discussed many of these ideas already, let this merely serve as a starting point for a more public discussion that should examine a larger constellation of ideas.

I would first 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 FCC reform endeavors, I hope that all of the commissioners will be involved in this process, including its development and initiation. 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 would also suggest that we work to update and republish the Commission's strategic plan. Completing this task would create a solid framework for future actions and demonstrate our commitment to transparency and orderliness, each of which is critical to effective decision making.

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. I am not suggesting that we make change for the sake of change. After all, we agree that the agency needs to be flexible and must be responsive to its myriad stakeholders, most importantly American consumers. There are, however, steps we likely would want to implement to increase our efficiency. For example, as you have already stated, delegating some authority back to upper and mid-level management, filling many of the numerous open positions with highly-qualified applicants and making more efficient use of non-attorney professionals come to mind.

As we have also discussed previously, we need to improve our external communications regarding FCC processes and actions. As an immediate first step, I suggest that we swiftly establish and publish Open Meeting dates for the entire 2009 calendar year. The public, not to mention the staff, would also greatly benefit if we would provide at least six months' notice on meeting dates for 2010 and beyond.

Also, we agree that we need to overhaul our internal information flow, collaboration and processes. I am eager to continue to work with you and Commissioner Adelstein to identify and implement measures to increase coordination among the commissioner offices, between commissioner offices and the staff, as well as among the staff. 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.

As part of these communications improvements, I share your desire to update the Commission's IT and web systems. They are in dire need of an overhaul. Clear, concise and well-organized information systems will ensure that all public information is available, easily located and understandable.

Finally, 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. I am confident that close collaboration with our government colleagues with similar or overlapping responsibilities would greatly benefit the constituencies we serve.

In closing, Mike, I again extend my warmest congratulations on your designation as Acting Chairman. I look forward to working together with you and Commissioner Adelstein to improve our agency during the coming days and weeks.

Sincerely,

A handwritten signature in black ink that reads "Robert M. McDowell". The signature is written in a cursive style with a large, looping initial "R".

Robert M. McDowell

cc: The Honorable Jonathan S. Adelstein



Office of Commissioner Robert M. McDowell
Federal Communications Commission
Washington, D.C. 20554

July 20, 2009

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Julius
Dear Mr. Chairman:

Once again, congratulations on your nomination and confirmation as Chairman. I am greatly encouraged and energized to know that you, Commissioner Copps and I will be working together on a plethora of communications policy challenges facing the economy and American consumers. Although you have only been here for three weeks, I applaud the steps you have already taken to reform the agency. Your recent statements regarding boosting employee morale, promoting greater transparency, and creating a more informed, collaborative and considerate decision-making process are heartening. Anything we could do to advance the timely and orderly resolution of Commission business would be constructive. I am confident that you will agree that the preliminary steps Mike took during his interim chairmanship have provided a sound footing upon which to build.

Accordingly, in the collaborative and transparent spirit of my January 29, 2009, letter to Mike, I offer below a number of suggestions on achieving the important public interest objectives of reforming this agency. As you and I have already discussed, these thoughts are intended as a starting point for a more public discussion that should examine a larger constellation of ideas for moving forward together to improve the public's ability to participate in our work, as well as our overall decision-making abilities. Many of these ideas have been discussed by many people for a long period of time, and if we don't care who gets the credit we can accomplish a great deal.

Operational, financial and ethics audit.

I would first 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, the National Exchange Carrier Association and the federal advisory committees. Just as you recently articulated in your June 30 request for information on the Commission's safety preparedness, I would envision this audit as an examination akin to a due diligence review of a company as part of a proposed merger or acquisition, or after a change in top management. I would not envision the process taking a lot of time; yet, upon completion, we would be better positioned to identify and assess the current condition of the FCC and its related entities, as well as how they operate.

This undertaking would be a meaningful first step on the road to improving the agency. As with all FCC reform endeavors, I hope that all of the commissioners would be involved in this process, including its development and initiation. We should seek comment from the public and the Commission staff, and we should provide Commission employees with additional opportunities 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 locations around the country to allow our fellow citizens to attend and voice their opinions directly to us.

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 be aware that the FCC actually makes money for the tax payers. As Mike has also noted, our methodology for collecting these fees may be imperfect. 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 methodology that lowers regulatory fees and levies them in a more nondiscriminatory and competitively neutral manner.

We should also work with Congress to examine Section 8 of the Act and the Commission’s duty to collect administrative fees. I am hopeful that we will examine 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. As you may know, 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. At the same time, our regulatees pass along those costs to consumers and they are the ones who ultimately pay higher prices for telecommunications services.

Further, given the significant concerns raised about the numbers and the way the audits have been conducted, I recommend that we examine the financial management of the universal service fund. You may know that the Commission’s Inspector General reported last year that the estimated erroneous payment rate for the High Cost program between July 2006 and June 2007 was 23.3 percent, with total estimated erroneous payments of \$971.2 million. While I am pleased that the OIG identified this error, it is time that we get to the bottom of this matter and remedy it.

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.

Update and republish the FCC strategic plan.

Also in connection with this review, I hope that we can work together to update and republish the Commission's strategic plan. Like me, you may find that, as we toil on day-to-day tasks, it can be easy to lose sight of our strategic direction. Completing this task would create a solid framework for future actions and demonstrate our commitment to transparency and orderliness, each of which is critical to effective decision making.

Potential restructuring of the agency.

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.

I am not suggesting that we make change for the sake of change. After all, we would agree that the agency needs to be flexible and must be responsive to its myriad stakeholders, most importantly American consumers. There are, however, additional improvements we can make to increase our efficiency. As Mike 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.

Next, I would encourage consideration of filling many of the numerous open positions with highly-qualified applicants and making more efficient use of non-attorney professionals. 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. Similarly, our economists could be better used to help assess the economic effects of our proposed actions.

Improve external communication.

As you and I have also discussed, we need to improve our external communications regarding FCC processes and actions. I greatly appreciate Mike's promptness in posting the Open Meeting dates covering his tenure. I am hopeful that we will swiftly establish and publish Open Meeting dates for the entire 2009 calendar year. The public, not to mention the staff, would also greatly benefit if we would provide at least six months' notice on meeting dates for 2010 and beyond.

As part of these communications improvements, I look forward providing input as to updating the Commission's IT and web systems. I applaud your commitment to this endeavor and Mike's success in securing additional funding toward this end. Clear, concise and well-organized information systems will ensure that all public information is available, easily located and understandable. I also 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. Additionally, I suspect that 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. We should seek comment on this, and other similar administrative reform matters.

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. Similarly, quite some time before your arrival, I went on record calling for giving the American public the opportunity to view and comment on at least a draft or outline of the National Broadband Plan. I look forward to working with you to increase public awareness regarding the status and substance of our work on this plan. 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.

In the same vein, Congress, the American public and consumers, among other stakeholders – not to mention your fellow commissioners – would greatly appreciate it if notices of proposed rulemakings actually contained *proposed rules*.

Improve internal communication.

Also, we need to overhaul our internal information flow, collaboration and processes. I am eager to work with you, Mike, and our future colleagues, to identify and implement additional measures to increase coordination among the commissioner offices, between commissioner offices and the staff, as well as among the staff. 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.

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. For example, for all rulemakings, within 30 days of a comment period closing, perhaps all commissioners could

receive identical comment summaries. Also, 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 would 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, we should aim to distribute briefing materials to all commissioners at least one week prior to the event date. The details here are less important than the upshot: all commissioners should have unfettered access to the agency's experts, and receive the benefit of their work. Again, I am grateful to Mike for his preliminary efforts in this regard.

Also along these lines, I hope that your team will reestablish the practice of regular meetings among the senior legal advisors for the purpose of discussing "big picture" policy matters, administrative issues, as well as to plan events and meetings that involve all of the offices. Given the numerous tasks we have before us, I trust you will agree that regular meetings among this group will improve our efficiencies, and go a long way toward lessening, if not eliminating, unpleasant surprises.

Just as important would be to hold regular meetings among the substantive advisors and relevant staff, including the Office of General Counsel. Having ample opportunity to review and discuss pending proceedings and the various options at the early stages of, and throughout the drafting process would allow us to capitalize 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.

Another idea is to update and rewrite our guide to the Commission's internal procedures, currently entitled *Commissioner's Guide to the Agenda Process*. For instance, just as Mike has done with respect to the distribution of our daily press clips, 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.

Coordinate with other facets of government.

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. I am confident that close collaboration with our government colleagues with similar or overlapping responsibilities would greatly benefit the constituencies we serve.

In closing, I again extend my warmest congratulations on your new position as Chairman. You are to be commended for the steps you have taken thus far toward rebuilding this agency. I look forward to working together with you, Mike and our new colleagues upon their confirmation to do even more.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert M. McDowell". The signature is written in a cursive, flowing style.

Robert M. McDowell

cc: The Honorable Michael J. Copps