STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act;* MB Docket No. 11-93

Today, we implement the CALM Act. From this point forward, TV commercials, such as those for OxiClean, ShamWow!, HeadOn and the like, will never be the same. Family rooms across America might be a little less noisy as the result of our implementation of Congress's will. The directly elected representatives of the American people have mandated that the FCC muffle the sudden volume increases of TV commercials and today we are giving that endeavor our best shot, absent reaching for our remote controls' volume or mute buttons.

Although I am generally supportive of our efforts today, I do have some reservations about a few of the rules we are adopting. I am concerned that Congress may not have given us the authority to take some of these actions[1] and, when addressing promotional announcements, we may not be faithfully executing the letter of the statute.[2] The legislative history of the CALM Act, however, stresses the overall objective of prohibiting disruptive and intrusive loud

[1] In making broadcasters and multichannel video programming distributors ("MVPDs") ultimately liable for passing through loud, embedded commercials by programmers – over which broadcasters and MVPDs have no control and we have no jurisdiction, we may be exceeding our statutory authority.

[2] It is possible to interpret the language of the CALM Act as providing the Commission authority to regulate the volume of commercials, but not promos. The CALM Act states that the Commission must prescribe rules to implement the ATSC standards moderating abrupt volume increases in advertising "*only insofar* as such recommended practice concerns the transmission of *commercial advertisements*. . . ." 47 U.S.C. § 621(a) (emphasis added). These standards differentiate between commercial and promotional content. *See* Advanced Television Systems Committee Inc., ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television, ATSC A/85:2011, at § 3.4–Terms, Annex I, 1.1–Introduction (rev. July 25, 2011) (stating that "[c]ontent includes commercials, promotional materials . . . , and programming . . . [and that] [t]he term 'interstitials'" applies to both commercials and promos"), *available at* http://www.atsc.org/cms/standards/a_85-2011a.pdf. The Commission itself also has recognized the content distinction between advertisements and promos and has treated them differently. *See* 47 C.F.R. § 79.1(a)(1), (d)(6) (providing different treatment of advertisements and promos in the context of or closed captioning rules); Closed Captioning and Video Description of Video Programming, MM Docket No. 97-279, *Report and Order*, 13 FCC Rcd 3272, 3345-46 ¶¶ 151-53 (1997) (same); *see also* Children's Television Obligations of Digital Television Broadcasters, MM Docket No. 00-167, *Second Order on Reconsideration and Second Report and Order*, 21 FCC Rcd 11065, 11083-84 ¶¶ 46-49 (2006) (explaining that "commercial matter" was traditionally defined to exclude promotions of upcoming programs and why, in the context of limitations on the amount of advertising inserted in children's programming, certain promos were included as part of a joint settlement). Promos are also not considered to be commercial advertisements under the statutory constraints governing noncommercial educational ("NCE") stations. *See* 47 U.S.C § 399b (an advertisement has to be broadcast or otherwise transmitted in exchange for consideration). We have excluded NCE stations from the rules adopted in this proceeding because they may not broadcast advertisements – and yet they remain free to air promos. In short, it is not readily apparent, based on the language of the statute alone, that it covers promos.

advertisements that are an annoyance to the consumer.[3] I am unsure whether we are getting the legislative intent right, but I remain hopeful.

Many thanks to my colleagues for taking specific measures to reduce the burden on stations and multichannel video programming distributors ("MVPDs"), such as adopting safe harbors, using programmer certifications to establish compliance for embedded commercials, providing for the sunset of the annual requirement to perform spot checks on non-certified programming, and lessening the effect on small operators by requiring them to monitor the volume of commercials only if there is a pattern of complaints specific to their particular station or system. I am also appreciative that Congress specifically provided the Commission with the ability to provide financial hardship waivers and recognized our general authority to waive our rules for good cause. I am hoping that such waivers will be reasonably provided to alleviate burdens on broadcast stations and MVPDs if our rules should cause unintended consequences.

I thank the Chairman and my colleagues for their willingness to incorporate some of my edits, and I applaud the Media and Enforcement Bureaus for their dedication and thoughtful work on a complicated matter. Thank you.

[3] *See, e.g.,* S. REP. NO. 11-340, at 1-2 (2010); 156 CONG. REC. H7720-21 (daily ed. Nov. 30, 2010) (statements of Reps. Anna Eshoo, Lee Terry and Gene Green); 155 CONG. REC S12710-11 (daily ed. Dec. 8, 2009) (statement of Sen. Sheldon Whitehouse).