REMARKS OF FCC COMMISSIONER ROBERT M. McDOWELL

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Thank you for having me here today. Many thanks to Dick and Patrick for inviting me. When I agreed several months ago to speak here, I didn't realize just how timely my visit would be. Patrick and Dick must have been clairvoyant to have known last summer that I'd be speaking just a few days after Chairman Martin released his de-regulatory idea for softening of the newspaper/broadcast cross ownership ban, and at the same time, laying the foundation for unprecedented regulation of the cable industry. If this were a classic novel, it might be entitled, "A Tale of Two Regimes." It is the best of times, and it is the worst of times. Maybe newspaper publishers and smaller broadcasters in the top 20 markets feel as though it could be the best of times (well, at least since 1975). But maybe not; they don't seem too excited by the Chairman's proposal. The cable industry says it is the worst of times. But their critics are saying that they aren't facing any competition, so they should stop their bellyaching. Perhaps they'd prefer the classic title "Hard Times." And I don't know if it's true, but I've heard that a graffiti artist emblazoned across NCTA's door the motto: "the beatings shall continue until morale improves."

Anyway, here we are just a couple of weeks before some Congressional hearings on these matters, and only a few days before some big votes. The debates are reaching a fever pitch and we have before us tinder boxes of controversy. I'm not here today to spark a firestorm. I'm too late. That has already happened. The flames are rising, and

the heat is on. But I'm hoping that cooler heads will prevail. So, today I'd like to give you my perspective on these proceedings. Let's look at how we got here, the process of the past several months, and what Congress and the courts have told us to do. But first, let's look at the concept of competition, which is at the heart of all of these decisions.

In the business context, Webster's Dictionary defines "competition" as a, "rivalry between two or more businesses striving for the same customers or market." Increased competition among newspapers, broadcast radio and television, cable television, satellite radio and TV, and the Internet have all been cited by many, including the Chairman, over the years as the evidentiary basis for updating or eliminating the newspaper/broadcast cross ownership ban. These media, he maintains, are all competing for the attention of the same customers and, therefore, advertising dollars.

At the same time, however, he is asserting that the cable industry, and the cable industry alone, is facing less competition and should be subject to more regulation. This is a radical departure for the Commission – a departure being made without sufficient chance for public comment. In fact, just last year, the FCC determined that cable subscribership was at about 60% penetration. Nielsen and Kagan numbers support this figure. According to the vast majority of other analyses, the cable industry's share of video customers has declined steadily in recent years. In fact in just the last year, six of the largest cable operators lost nearly 200,000 video customers. These are figures that cable companies have to report under the Sarbanes-Oxley Act, so presumably they are accurate -- seeing as how prison time could otherwise be involved. In the meantime, the two satellite companies, DirecTV and EchoStar, gained 1.8 million customers in the last year and are now the second and third largest multichannel video program distributors.

AT&T, Verizon and other incumbent telephone companies, are now also competing for video customers. Verizon is rapidly approaching 1 million video subscribers.

But now the Commission is proposing to throw out that data and insert new studies from Warren Communications even though Warren Communication's Managing Editor says that his figures "aren't well suited" for determining whether the 23-year-old 70/70 rule has been triggered. He says he had no idea that the information he provided to the mysterious FCC staffer who requested it would be used for such purposes. And, had he known, he said he would have used footnotes and caveats to put his study in the proper factual and analytical context. All of this uncertainty is precisely why Commissioner Tate and I sought more data to illuminate this mysterious development.

I have a lot of questions that need answering. Why is the FCC suddenly changing its evidentiary standard and methodology just for this one industry? How will this abrupt and radical departure affect other analyses and proceedings? Doesn't this shift weaken arguments for updating the cross ownership ban? Does our proposed change affect our analysis of the proposed XM-Sirius merger? How do we reconcile decades of data showing more convergence and more competition among more delivery platforms with this sudden reversal? I am searching for credible answers to these and many other questions—thus far to no avail.

But let me get back to the original topic of this now verbose speech: media ownership. In contrast, we are rushing toward a decision in media ownership the way a slug races across a garden. Let's review the procedural history.

The current proceeding began at my first open meeting as a Commissioner, 17 months ago. This proceeding has been unprecedented in scope and thoroughness. We gathered and reviewed over 130,000 initial and reply comments and extended the comment deadline once. We released a Second Further Notice in response to concerns that our initial notice was not specific enough about proposals to increase minority and female ownership of stations. We gathered and reviewed even more comments and replies in response to the Second Notice. We traveled across our great nation to hear directly from the American people during six field hearings on ownership in: Los Angeles and El Segundo, Nashville, Harrisburg, Tampa-St. Pete, Chicago, and Seattle. We held two additional hearings on localism, in Portland, Maine and here in our nation's capital. In those hearings, we've heard from 115 expert panelists on the state of ownership in those markets and we've stayed late into the night, or early into the next morning, to hear from concerned citizens who signed up to speak.

We also commissioned and released for public comment ten economic studies by respected economists from academia and elsewhere. These studies examine ownership structure and its effect on the quantity and quality of news and other programming on radio, TV and in newspapers; on minority and female ownership in media enterprises; on the effects of cross-ownership on local content and political slant; and on vertical integration and the market for broadcast programming. We received and reviewed scores more comments and replies in response. Some commenters did not like the studies and their critiques are part of the record.

So, during my entire term as a Commissioner, we have been reviewing this matter. But our review didn't begin last year. The previous round began in 2002. At

that time, the Commission received thousands of formal comments and millions of informal comments. The Commission held four localism hearings across the country to gather additional evidence. The FCC also produced twelve media ownership working group studies. We all know that the 2002 review ended badly for the Commission – with both the legislative and judicial branches reacting through a Congressional override of the national ownership cap, and a reversal and remand from the Third Circuit in the *Prometheus* case. By the way, while the court threw out almost all of the Commission's order, it concluded that, "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest."

But our story didn't begin in 2002 either. In 2001, the FCC issued a rulemaking focused on the newspaper-broadcast cross ownership ban – a concept that has been around since at least 1975. Comments and replies were gathered there too. That proceeding sprouted up as the result of a June 2000 report from a Democrat-controlled FCC, which found that the ban may not be necessary to protect the public interest in certain circumstances. That report was the result of yet another proceeding, which commenced in 1998. The 1998 proceeding stemmed from a 1996 proceeding; which was sparked by legislation; which was engendered by an overwhelming and bi-partisan vote of a Republican-controlled Congress and signed into law by a Democrat President.

In my 17 years of being in and around the FCC, I can't think of any issue that has been examined more thoroughly. I can't remember any proceeding where the Commission has solicited as much comment and given the American people as much opportunity to be heard. If anyone knows of an FCC proceeding where there has been

more opportunity for debate over an 11-year period, please let me know. I just hope the Commission doesn't fumble the procedural ball now that it's fourth down and goal.

One of the many things I have learned during my adventure at the FCC is that opponents of any further de-regulation have been far more vocal and organized than proponents of more relaxed rules. In fact, while broadcasters have prioritized their opposition to the XM-Sirius merger and the use of TV white spaces over their advocacy for relief under media ownership rules, their opponents have skillfully recast the debate into whether old and new media should live under additional regulations, not fewer. In the meantime, at our hearings, witnesses on behalf of broadcasters prefer to discuss the positive contributions broadcasters make to their communities rather than the competitive threats they may face that might warrant deregulation. Don't get me wrong, broadcasters' community involvement and support are beneficial endeavors. But the legal question before us involves some measurement of the competition faced by broadcasters. Much of their oral testimony fell short of shedding light on that subject.

Fortunately, the voluminous written record is considerably more data-rich and offers a more dispassionate discussion of the facts. The public hearings have been a better measurement of emotion than dispassionate data; but they have been very valuable. At a minimum, they have provided our fellow Americans with the chance to vent their frustration with the federal government. We have been yelled at about the Iraq war, global warming, the tyranny of America's copyright laws, and the need to legalize drugs, among other topics. And then there was the fellow in Los Angeles who had a very strong opinion about the Peloponnesian War. Now, I don't mean for this to sound like a cop-out, but that was before my time at the Commission. But in all seriousness, I've greatly

valued hearing directly from the thousands of people who have traveled to these hearings, often on short notice. While we have been the object of a great deal of anger, being on the frontlines of democracy in this way has deepened my love for our country and its diverse peoples. We are truly the greatest nation on earth.

But, a point that gets lost in the emotion over these issues is that the directly elected representatives of the American people, the Congress, enacted a statute that contains a presumption in favor of modifying or repealing the ownership rules as competitive circumstances change. Section 202(h) states that we must review the rules and "determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation that it determines to be no longer in the public interest." This section appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule, and it is crucial for everyone involved in this debate to recognize this important presumption.

But before I go further on this point, just a reminder, and full disclosure: both of my parents were print journalists. My father, Bart McDowell, was a senior editor of *National Geographic Magazine*. He met my mother, Martha Shea McDowell, after World War II at the University of Missouri's famed School of Journalism where she was on the faculty. She went on to become a reporter for the *Chicago Daily News* at a time when almost no women held such jobs. She went on to work for the *Washington Post* and was there when the cross ownership ban went into effect. So I found it especially remarkable, when I was sorting through her estate - after she passed away in 2005 - to find a book entitled *The Fading American Newspaper*. I've read through it and I've

come across some timely quotes. Here's one: "As journalism migrates into new areas of communication, its practitioners, too, are on the move. The commerce in information flourishes and quickens its tempo, new skills are developed, and the major problem for the newspaper journalist is to keep his readers from migrating, too." So when was this book written? 2005? 1975? No, it was written in 1960. Its author is Carl Lindstrom who was executive editor of the *Hartford Times* and a journalism professor at the University of Michigan. But the point is that there is not a general concept before us in this proceeding that hasn't been debated for decades.

Even though the newspaper industry was already facing challenges in 1960, it has undergone dramatic change in the 32 years since the newspaper-broadcast cross ownership ban went into effect. Now we have five national networks, not the three I grew up with. Today we have hundreds of cable channels spewing out of a multitude of video content produced by more, not fewer, but more entities than existed 32 years ago. In 1975, cable was in its infancy and had yet to develop programming. Now we have DBS, telephone companies offering video, cable overbuilders, the Internet and its millions of websites, iPods, satellite radio, cell phones, Wi-Fi, video-on-demand, digital video recorders, pay-per-view, *etc.* There is no disputing that the marketplace has been transformed by technological advances and business innovations into the most competitive multimedia environment in human history. Consumers have more choices and more control over what they read, watch and listen to than ever. As a result, at least 300 daily newspapers have gone out of business in the last 32 years because people are looking elsewhere for their content. Newspaper circulation has declined year after year. Since just this past spring, average daily circulation has declined 2.6%. Newspapers'

share of advertising revenue has shrunk while advertising for online entities, which are not subject to cross ownership restrictions, has surged. Is the cross-ownership ban still in the public interest, or is it a millstone around the neck of a drowning industry? The statute demands an answer.

Has this new era of competition been helpful or harmful to localism and diversity? Audiences seeking news, local information and entertainment are more fragmented than ever before. But combinations allowed by the 1996 Act have occurred. What these changes mean for localism and diversity remains an unanswered question. On the one hand, some argue that combinations that may have been dangerous to diversity in 1975 are no longer any threat due to the existence of an unlimited number of delivery platforms and content producers. Not only are there more hoses to deliver the information, there are more spigots to produce the information. On the other hand, most people still rely primarily on television broadcasts and newspapers for their local news and information. With local broadcasters and newspapers still producing a large share of local online content as well, are there really more diverse sources of local journalism than before? All of us must handle this question with great care.

That question begs yet another question that is vexing to me: what can the FCC do to promote ownership among people of color and women? Many positive ideas put the Commission into a legal vice grip, with Supreme Court prohibitions against race-specific help on one side, and a lack of statutory authority for doing much more on the other side. Like it or not, whatever the FCC or Congress does must withstand constitutional muster. The strict scrutiny standard adopted by the Supreme Court in *Adarand v. Pẽna* applies to all racial classifications imposed by the federal government.

It is a difficult standard to satisfy. Like it or not, post-*Adarand*, regulators have to walk a constitutional tight rope when considering how to define the class that should benefit from policies intended to encourage ownership diversity. Adopting rules that would be struck down on appeal would only provide false and fleeting hope to the very people the rules were intended to help. So let's focus on the possible -- and the legally sustainable.

One of our ownership studies (Study #7) finds that women and people of color are clearly underrepresented in the radio, TV and newspaper industries – no surprise there, sadly. But it also finds that this pattern holds across a broad sampling of industries at relatively similar rates, so that the radio, TV and newspaper businesses are not unique. The study also finds that access to capital is the primary cause of under-representation. Or, to quote Jack Kemp, "you can't have capitalism without capital." Accordingly, the study recommends several improvements to the FCC data collection process to track race and gender in ownership. Gathering better data could easily be fixed. Putting incentives in the right place so that it's in the economic interest of businesspeople to solve the access to capital problem? Not so simple.

The most promising idea may be renewal of the tax certificate program, which permitted deferral of gain realized upon the sale of a broadcast station to a minority-owned or controlled entity. It was successful in increasing the number of minority owners. During the program's lifespan, 364 tax certificates were issued for transactions involving sales to minorities: 290 radio, 43 television, and 31 cable television. But it was repealed in Congress by an overwhelmingly bi-partisan vote in 1995. Today, Chairman Rangel's bill to restore it allows for a tax deferral of up to $50 million from a sale to small businesses that own 10 or fewer broadcast stations. Chairman Rush's bill permits a

taxpayer to exclude from gross income some of the gain for a sale to an eligible purchaser, such as an economically and socially disadvantaged business. While our role at the Commission is not to lobby for any particular legislation, I am encouraged that Congress is considering tax incentives to bolster minority ownership. Putting the incentives in the right place so that sellers have an economic interest to sell stations to minorities or small businesses may be the most effective means of increasing minority ownership.

But here we are, in the middle of another public comment period. Soon the Commission might be testifying before both Houses of Congress. Further deliberation ensues. While the FCC races ahead like "a runaway glacier," as one analyst put it, the private sector has been busy working around the regulations of yore. Is it any wonder that most of the energy, creativity, capital and growth have been focused on areas that are less regulated? The ironic truth is: in many cases, media consolidation has actually become media divestiture. Companies such as Disney, Citadel, Clear Channel and Belo actually have been shedding properties to raise capital for new ventures. They are directing new capital investment toward new media ventures. That's where America's eyeballs are looking; so that means that's where the ad dollars are flowing. The Hollywood writers' strike is all about the concept of following the eyeballs and ad dollars. For instance, over one-third of Americans go online to get their news. That number is growing. Traditional media's numbers are shrinking.

While heavily-regulated newspapers and broadcast properties decline, unregulated new media is in its ascendancy. This new frontier is especially promising for people of color and women. The rise of so-called "niche" markets is benefiting people who have

been underserved in the past. The low barriers to entry and low capital requirements to get started have spawned a plethora of minority and women oriented new media outlets such as: NetNoir.com, a minority owned online destination that connects people interested in African American culture and lifestyle; or iVillage.com, which provides daily hot topics for women; or Women's eNews.com, an online source for news and perspectives of particular concern to women. The exciting news is that all Americans will benefit from this new paradigm because new technology empowers the sovereignty of the individual regardless of who you are. While this new era is in its infancy, and we have a long way to go before it matures, I am confidently optimistic that the media ownership debates of the early 21st Century will fade into obscurity as technology and competition advance.

Thank you again for inviting me here today. Please have a happy Thanksgiving. And I look forward to taking your questions.