

OPENING STATEMENT

of

MICHAEL K. POWELL

Commissioner

Federal Communications Commission

Before the

Subcommittee on Telecommunications, Trade

and Consumer Protection of the House Committee on Commerce

*“Federal Communications Commission Reform for the New Millennium”*

2123 Rayburn House Office Building

Washington, D.C.

October 26, 1999

Good morning, Mr. Chairman and other distinguished members of the House Subcommittee on Telecommunications, Trade and Consumer Protection. Thank you for inviting me here to discuss “Federal Communications Commission Reform for the New Millennium” and Chairman Kennard’s draft “strategic plan.”

I will start by stating that I wholeheartedly support Chairman Kennard’s efforts and commend his leadership in developing this draft strategic plan. The “vision” that the draft plan has of “vigorous competition that will greatly reduce the need for direct regulation” is laudable and consistent with Congress’ intent in drafting the 1996 Act. I, therefore, generally support the goals of the plan and its commitment to make the agency “faster, flatter and more functional.”

In my testimony this morning, I would like to highlight for the Subcommittee some of the elements of the draft plan, and, of course, talk briefly about the few areas that may need further consideration by both the Commission and Congress.

In March, when we were last here to testify on FCC reauthorization, I submitted five areas for exploration: (1) the need to more clearly define the Commission’s annual priorities and focus; (2) the need to operate efficiently enough to meet the demands of an innovation driven market; (3) how to better align the agency with market trends and demands; (4) whether to continue the administration of functions that are largely duplicated elsewhere in government; and (5) the breadth of the Commission’s quasi-legislative authority. I am pleased that many of these areas are considered in the Chairman’s draft plan, but I believe that it alone will not completely obviate the need for Congress to monitor and perhaps modify the agency in response to rapid

change in the industry and to ensure that Congress' pro-competitive, deregulatory vision, embodied in the 1996 Act, is realized.

## **I. The Commission's Mission, Goals and Objectives**

A must-do for any organization – from the smallest to the largest – is to establish goals and objectives that are measurable and achievable. Congress sets the Commission's mission and goals in the first instance. In my mind, it is our duty to implement specific statutory direction, before, or concomitant with, any discretionary authority. This simple priority principle should stand foursquare at the summit of any Commission plan.

I believe, generally, that the draft strategic plan covers the broad areas that should guide our work in coming years. However, I would point out two areas that I believe are important and derive from Section 1 of the Act, but are omitted in the present draft: (1) the promotion of safety of life and property and (2) the national defense.

As the "Defense Commissioner" responsible for the FCC's emergency preparedness, security and national defense matters, I have asked the Chairman to include up-front in the plan these important statutory goals. These issues are becoming more acute and more challenging as competition and deregulation drive greater commercial activity. While I intensely encourage new entry and applaud innovative business models, these interests do not always coincide with governmental interests in law enforcement and national security. I would alert the Congress to the growing challenge of reconciling these competing interests. Some of these challenges include fulfilling the spectrum needs of federal, state and local public safety entities; ensuring

that law enforcement continues to have the necessary tools at its disposal in the digital age; balancing the competing demands for spectrum by governmental and non-governmental institutions, particularly in international forums; and safeguarding critical national security and defense assets.

With an expansive and complex statute it is difficult to compress into one sentence and four enumerated goals the purpose of the FCC “for the 21<sup>st</sup> Century.” I congratulate Chairman Kennard for his attempt to do so. Such an endeavor, however, necessarily produces a document of lofty generalities. The more significant challenge is to translate this strategic vision into an operational plan, detailing the means for reaching the objectives and the resources for doing so. My only caution here is that it is always more difficult to execute a plan than to craft one, and I have some concerns that the goals in this strategic plan are overly optimistic and some of its numeric targets potentially unhelpful.

I think the Chairman’s draft strategic plan includes some appropriate implementation steps and ways to measure our results. He has also put in place a top-notch team of FCC managers and professionals to implement these steps. My limited concern, however, is that the plan takes a fairly long-term view of our mission and priorities (5 years). What form the communications market will have taken by then is anyone’s guess, and one must be a bit skeptical that any restructuring along that time horizon will unfold as planned. While a long-range strategic plan has some value in setting an approximate course, it is perhaps more important to work on specific priorities calibrated to shorter timeframes.

For example, as I testified in March, I continue to believe that it would be useful for the Commission to enumerate clearly and widely communicate a set of annual priorities. I would favor a more structured process by which the Commission formally develops and publicly reports its priorities for the upcoming year to help focus the work of the Commission and create greater regulatory certainty. To assist in this and other managerial challenges, I would consider creating a professional management position in the Commission, dedicated to operational matters.

Let me now offer a few observations regarding specific subjects covered in the draft plan.

## **II. Some Highlights of the Draft Strategic Plan**

### **A. Internal Procedures**

In the effort to improve internal procedures, we should be centrally focused on drastically improving efficiency. In a market guided by “Internet” time, the FCC needs to make quicker, more timely decisions. This is why I fully support our current and future efforts to modernize and automate many of our functions. The FCC is focused, rightly, on becoming a “model agency for the digital age.” I have been very impressed by the various automation efforts, including the spectrum auction bidding system and the Wireless Bureau’s “ULS” project. Automated tools are appropriate for the bulk of the routine and non-controversial work. At the same time, however, we need to find ways to accelerate decisions involving complex transactions and important policy questions. Here, more than any other area, a decision that comes too late, might as well not have been made at all.

Therefore, I am encouraged by the draft plan's proposals to eliminate multiple levels of review, making the agency faster, flatter and functional. We must be structured to render decisions quickly, predictably, and without imposing needless costs on industry or consumers through unnecessary delay. In this regard, while I agree with the proposal to act on certain petitions for reconsideration within 60 days of the record closing, I would suggest the same expedited treatment of applications for review of actions taken on delegated authority, as well.

Finally, I am very pleased to see that the Chairman will restructure the Office of the Secretary to facilitate management of Commission proceedings and to ensure Commissioners adhere to timetables and voting procedures. I also anticipate that the Secretary will be instrumental in facilitating the Bureaus' disposal and release of pending matters.

## **B. Structural Changes**

The Chairman's draft plan clearly recognizes (as almost everyone has) that the Commission is currently organized around industry segments that increasingly are less relevant as convergence strains and eliminates their unique technical distinctions. I generally concur with the Chairman's proposals to reorganize the agency along functional rather than technological lines. I supported the consolidation of dispersed functions into the new Enforcement and Consumer Information Bureaus and I look forward to these new bureaus getting started soon.

I am very intrigued (but not yet sold) by the second phase proposal to consolidate the FCC's policy/rulemaking and authorization of service/licensing functions. A single policy/rulemaking bureau may have some merit. For one, it will increase the field of view of

management, hopefully in a way that harmonizes our decisions across industry segments. However, given the depth and breadth of our policy/rulemaking responsibilities, a single bureau overseeing these functions could prove too large and unwieldy. Moreover, because the Communications Act continues to categorize industries based on technology, a consolidated bureau, while appearing functional, may in fact collapse into a “mini FCC” with separate divisions charged with particular sections of the Act. This subject requires the fullest consideration, but I caution one not to expect revolutionary changes in the analysis or outcomes of our decisions as a consequence of this type of organizational change.

### **C. Deregulatory Initiatives**

I regret that the deregulatory objectives of the draft plan fall short of my expectations. It seems that one of the core principles articulated in the plan is that we “deregulate as competition develops.” As I have written several times, I am of the view that in many instances, deregulation is a necessary pre-requisite to competition developing. I have often observed a hesitancy to deregulate, under the belief that competition has not yet fully developed or matured. The assumption is that regulation is removed only when it has been rendered superfluous because of competition. In some areas, this may be true. But, this approach fails to recognize the interrelationship between regulations and the development of competitive markets. Regulations often distort market incentives or inhibit efficient entry and competition. Deregulation, then, is not just desert, served after competition comes out of the oven. It is a necessary ingredient to the competition dish.

Although I will not get into the details of the dispute over these core beliefs, I generally see deregulation (whether in the form of forbearance, streamlining or a biennial review) more as a *means* of facilitating competition through the elimination of burdensome regulatory requirements. It is not a reward to hold out to industry, after *the government* determines that there is enough competition to grant relief. I would suggest that the plan's deregulatory component be beefed up to shift our paradigm for handling forbearance requests and the next biennial review toward a presumption in favor of deregulation and an obligation to re-justify regulations that are retained, with the burden to do so resting with the Commission.

### **1. Forbearance**

The draft plan says that the Commission will “consider additional areas that may be appropriate for forbearance,” claiming that we have already engaged in substantial forbearance. I cannot concur with this favorable view of our forbearance record. The true tale is not in the numbers (no matter how well massaged), but how meekly we have wielded the powerful forbearance tool. Yes, we have swatted a few gnats, but very few dragons. I think Congress expected us to be much more aggressive. Indeed, I believe Congress intended that when we are faced with a petition to forbear that we should have to fully justify a decision that leaves the rules on the books. If we cannot, the rule should fall. The burden rests with us.

### **2. Biennial Review**

The Biennial Review requirement of Section 11 of the Act, like Section 10, is a very important provision enacted in 1996. I share some of Commissioner Furchtgott-Roth's concerns about the Commission's first biennial review and, as I recall, Chairman Kennard responded



favorably to Commissioner Furchtgott-Roth's ideas for the Year 2000 review. I am also very pleased that Chairman Kennard's draft plan calls for "an aggressive" biennial review next year, citing wireless as an area where competition has clearly emerged and where most regulation has become unnecessary. I can only add to the thoughts of my colleagues on this score by emphasizing that I expect that we will take on the burden of justifying the rules that we keep and to grapple head on with the statutory public interest test of "meaningful economic competition."

#### **D. Duplicative Functions**

As I testified in March, it is very important to address areas where Commission authority and activities overlap with those of other government agencies. While such governmental overlaps may be desirable, they should at least be complementary (or supplementary) rather than simply duplicative. I am glad that the draft plan provides that we will continue efforts to coordinate with other federal agencies (and with state and local governments) and, especially, to improve coordination with the Federal Trade Commission and the Departments of Justice, Commerce and State to ensure that our respective functions are more complementary. However, some of the FCC's functions must be thoroughly evaluated in the context of the overlapping duties of other federal agencies and state and local jurisdictions.

#### **1. Merger Review**

For example, merger review is the topic of several pending bills and of much interest lately as we see a pace of strategic consolidation in telecommunications and media markets like we have never seen before. The FCC's review of major transactions should be generally limited to those areas in which we can claim primary expertise. While I believe that there is room to

preserve a complementary role for the FCC in the review of mergers, we need to have some disciplined procedures and limiting principles to ensure the rapid processing of such transactions, to preserve the rights of the parties and to avoid duplication with other authorities. I have articulated in more detail some of these limiting principles and have criticized our current process in recent public statements, which I would be pleased to pass on to the Subcommittee.

Chairman Kennard's plan (which is not yet part of the strategic plan) to set up an intra-agency transactions team in the Office of General Counsel may be a promising proposal. I fully support efforts to make the FCC's merger review process more predictable and transparent. But we need more than a new box on the organizational chart. We need much more significant consideration of two areas for revision: (1) we must institute a clearly articulated review process replete with timing benchmarks, and (2) Congress and the Commission need to reevaluate the applicable merger standards to limit duplication and guard against extraneous conditions. I look forward to considering a proposal along these lines.

## **2. Other Areas**

Let me briefly address other areas that overlap with other governmental institutions: consumer protection, equal employment opportunities (EEO) and political campaigns. First, one focus of the draft plan is rightly on consumer protection. For, as we have seen in the slamming area, competition tends to bring out of the woodwork those that try to cheat consumers for a fast buck. We must, within our authority, be vigilant in keeping the cheaters at bay. At the same time, we must recognize that there are other agencies and jurisdictions that have similar authority and some judgment might be made as to which is best positioned to administer certain issues.

We must also examine whether all aspects of the Commission's EEO program should remain separate from the Equal Employment Opportunity Commission and the federal, state and local civil rights authorities. Although there is some advantage to having the FCC involved because of its unique relationship with certain industries, in times of tight resources and many other priorities at the FCC, we must ensure that the FCC's and EEOC's respective roles remain complementary and not duplicative. By deferring some aspects of this program to the expert civil rights agency (as the Commission has done in certain respects under memoranda of understanding with the EEOC), we are in better position to justify the government's role in promoting employment opportunities in the dynamic and growing communications industry.

Finally, with an election year soon upon us, the FCC will be facing more pressure to enforce and even expand the political obligations of broadcast licensees. There are unquestionably problems in our electoral system, but I shiver at the suggestion that the *Communications* Commission ought to play a central role in such matters without comprehensive direction from Congress. Unbridled discretion to affect campaigns by three of five unelected regulators is unwise. Moreover, the FCC lacks the knowledge or expertise to properly balance electoral interests or to weigh the effects on existing election law. I would leave that to the Federal *Election* Commission, if anyone.

#### **IV. Legislative Recommendations**

Many of the concerns I have raised, in addition to many other significant issues such as broadband access and inter-LATA data relief, may demand Congress' attention over the coming months. However, I recognize the difficulty of enacting major FCC reform initiatives so soon after passage of the 1996 Act. In the near term, less controversial legislative tweaks that support the Commission's efforts to reform itself and become more efficient may be beneficial.

For the most part, Chairman Kennard's draft strategic plan can be executed by the Commission and its most highly regarded staff without congressional intervention. However, the list of modest legislative recommendations attached to the plan will surely help facilitate its implementation. I generally support them and I will briefly commend the Subcommittee's attention to a couple.

First, the proposal to exempt the Commission from the Government in the Sunshine Act should be considered. I recognize that at first blush, it seems fantastic to support less openness. But the fact is that the Sunshine Act not only has failed in its purpose, it may have had the opposite effect. The notion that substantive decisions are debated by Commissioners in public meetings and voted after such deliberation is fiction. The press of business requires that most items be voted on circulation. Moreover, even the votes at open meetings are ceremonial, the decision having been debated and determined in advance. The Sunshine Act, in fact, impedes efficient decision-making. Because three Commissioners may not discuss a substantive matter (except at a public forum), questions are filtered through and among layers of Commission staff and then are communicated back and forth to the Commissioners. This produces a lengthy and

often chaotic decision-making process. Our decisions certainly should not be cloaked in the shadows, but they are presently being scorched by sunshine.

Second, the Chairman's legislative proposals that would provide flexibility to restructure our operations also deserve attention. For example, "voluntary separation incentives" or employee "buyouts" would facilitate further staff downsizing and redeployment, to be more responsive to the ongoing industry convergence and more conducive to a functional organizational structure. Additional flexibility to hire outside experts and consultants would allow the Commission to attract talented experts to augment our current staff's expertise.

Third, I favor the Chairman's proposals to strengthen our enforcement assets, including those that toughen penalties for violation of the Communications Act and FCC rules and that provide for speedier judicial review of Commission forfeiture orders.

## **V. Conclusion**

I look forward to continuing to work with Members of Congress and with my colleagues on the many challenges ahead. I trust that, by working collaboratively and by having faith in free markets, we will bring the benefits of competition, choice, and service to American consumers as envisioned by the 1996 Act.

Thank you for your attention.