WRITTEN STATEMENT

of

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on

The 2002 Broadcast Ownership Biennial Regulatory Review

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Committee on Commerce, Science, and Transportation
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Good morning, Mr. Chairman, Senator Hollings, and distinguished members of the Committee. I appreciate the opportunity to appear before you to discuss the Commission's biennial review of its broadcast ownership rules. This hearing provides us with an opportunity to discuss the changes that this Commission has made and why I believe our decision furthers our core goals of competition, localism, and diversity.

Overview

On Monday, the Commission faced another historic decision affecting free speech where we needed to decide whether to be guided by facts or by fears. For literally years, this Commission has struggled to strike an appropriate balance in its media ownership rules. Many have argued that this proceeding is about the core of our democracy — and I agree. And nothing is more fundamental to democracy than following the rule of law as given to us by Congress and as interpreted by the courts. It is a heavy responsibility and I believe we have exercised it well.

I began my review of the FCC's media ownership rules with three inescapable realities: The Telecommunications Act of 1996, the judicial decisions interpreting it, and the United States Constitution.

First, the Act requires the Commission to conduct a review every two years to determine which of our broadcast ownership rules can be justified in the modern media world. We are already five months behind schedule for our 2002 biennial review and have therefore been unfaithful to the statute. I understand that some members of Congress, this Committee, and the public have requested that we delay this proceeding, but I could not do that and also adhere to the statutory mandates.

Second, judicial decisions in this area have struck down every broadcast ownership rule the courts have reviewed since the 1996 Act. Each time the courts found the FCC had failed to justify the limits it continued to place on broadcast ownership. A decision to maintain all our rules in their current form would be contrary to the edict from the courts and would most likely be remanded, or indeed vacated, by the courts.

Third, the First Amendment to the Constitution protects the free speech rights of broadcasters. Any rules we retain must be a reasonable means to accomplish our public interest goals. The federal court opinions specifically tell me that any restrictions we place on ownership must be based on concrete evidence — not on fear and speculation. Based on the record, I could not conclude that most of our previous rules would meet this standard.

Within these parameters, the decision we adopted on Monday tailors our ownership restrictions to the competitive realities of today's media marketplace, which includes not only more broadcast stations than ever before, but also cable operators, direct broadcast satellite providers, and other outlets. It also safeguards free over-the-air television by granting additional flexibility in response to the increased competition broadcasters are facing and the increased costs they are incurring to produce local news and to transition to the digital age. Moreover, by preserving several key ownership restrictions, our decision ensures that the public will continue to receive diverse and independent sources of local news and information. In contrast to previous Commission efforts, we have discharged our statutory obligation to provide a rigorous justification of these rules, thereby diminishing the prospect of our ownership restrictions being vacated by the court of appeals.

Statutory Duty

I am pleased that a majority of the Commission has fulfilled its statutory duty to modify outdated rules where marketplace developments have rendered them no longer "necessary in the public interest." Congress instructed the Commission to determine every two years whether our ownership restrictions remain "necessary in the public interest" in light of the competitive developments. Section 202(h) accordingly requires the Commission to determine whether each of our broadcast ownership rules could, in essence, be readopted on the ground that it serves the public interest. The courts interpreting Section 202(h), though, have made clear the statute carries with it a presumption in favor of repealing or modifying our ownership rules. Thus, if we do not affirmatively justify the retention of each rule, it will be eliminated. Furthermore, under the First Amendment, any restrictions we impose on the speech rights of broadcasters must be a reasonable means of promoting the public interest in a diverse and competitive media. In short, we must be able to demonstrate that our existing rules are reasonably necessary to promote competition, localism, and diversity — or we *must* modify or eliminate those rules.

In conducting this analysis, the Commission compiled a record of unprecedented breadth and depth. The record includes hundreds of thousands of comments, 12 independent studies, and testimony from a number of broadcast ownership hearings. We provided adequate notice of the rules under review at a level of specificity that is consistent with the scores of other NPRMs we have issued in other contexts in recent years. I am confident that we have fully complied with the Administrative Procedure

Act. And I am satisfied that we had the information and the input we needed to make a sound, judicially sustainable decision that will benefit the public interest.

Timing

Despite concerns that have been expressed, the path that led to Monday's decision was anything but a rush to judgment. The FCC initiated a review of the newspaper/broadcast cross-ownership rule and the local radio ownership rule in Fall of 2001. We were also required to respond to court remands of the local television ownership rule (adopted in 1999) and the national television cap (adopted in 2000). Those decisions were made three to four years ago and the NPRMs in these cases were issued in 1996 and 1998 — *five to seven years ago*. The Commission thus has had, for the most part, between 18 months and seven years to craft legally sustainable media ownership rules. While some would prefer to continue debating the issues in this 2002 biennial review, it is almost time to begin the 2004 biennial review. The issues before us are difficult and complex, but our task would not have become any easier a week from now, a month from now, or even a year from now.

Broadcast Ownership Rules

Based on my review of the record, I am persuaded that several ownership limitations — in their current form or with some modifications — remain "necessary in the public interest" to preserve competition, localism and diversity. These rules thus met the legal standard demanded by Congress and the courts. Rules that did not meet this standard were not retained. Overall, our restrictions are grounded in actual evidence of harm, as required by the courts, not in merely hypothetical fears.

First, in the process of retaining our current limits on ownership of radio stations, we have tightened our definition of radio markets to ensure that it more accurately reflects the level of competition in these markets. Second, our television ownership rules continue to maintain the prohibition of mergers among any of the top four networks. Third, for such other matters as restrictions on local television ownership, the national television cap, and our cross-ownership rules, we have preserved structural limitations in revised forms. We have modified these restrictions because, not only do the former rules fail to promote competition, localism and diversity, but they may actually be *harming* these goals. For example, the record demonstrates that combinations of two television stations actually produce more local news. The record also demonstrates that newspaper-owned television stations provide more news and public affairs programming and receive more industry awards for such programming than unaffiliated stations. If we kept our existing rules unchanged, we would artificially restrict such benefits to local communities with no countervailing advantages.

While the public can benefit from some combinations, I strongly believe that the Commission must continue to impose prophylactic rules to ensure that the public receives a range of independent and competitive sources of local news and information in each market. The changes we made to our local television ownership rule will allow common ownership of no more than two television stations in markets with 17 or fewer television stations, and no more than three television stations in markets with 18 or more television stations (thereby ensuring a *minimum* of six distinct owners in many markets). Moreover, media companies may not own more than one of the top four stations in a market. The changes we are making to the newspaper/broadcast and radio/television

cross-ownership rules restrict any such combination in all markets with three or fewer television stations, and allow for limited combinations in mid-sized markets. Our new cross-media limits recognize that broadcast television and radio and newspapers continue to be the primary sources of local news and information, and the rules restrict ownership accordingly.

With respect to the national television cap, the record in this case supported raising it to 45 percent. I believe this level will preserve the affiliate/network relationship and help ensure that television programming reflects the tastes and values of local communities. Allowing networks to increase their reach to 45 percent of the national audience, moreover, compared to 35 percent or proposals of 40 percent, translates into an increase of their presence in only a handful of markets.[1]

Despite the significant degree of structural regulation that we are retaining, I realize that some people will oppose our decision on the ground that the four major networks air the programming that is chosen by approximately 75 percent of viewers during prime time. To me, the critical fact is that these providers control no more than 25 percent of the broadcast and cable channels in the average home, even apart from the Internet and other pipelines into the home. This means that Americans are watching these providers because they prefer their content, not because they lack alternatives.

New Initiatives

The defining characteristic our biennial review decision is balance. We have undertaken affirmative steps to retain limits on ownership where they can be shown by

[1] Moreover, the percentage of commercial stations that the networks own is very small: CBS owns 2.9%; Fox, 2.8%, NBC, 2.2%, and ABC, 0.8%. Even if these companies increased their national reach to 45%, these percentages will only increase modestly.

actual evidence to promote competition, localism, and diversity. In the process of reaching this balance, we have also taken some additional steps.

First, I was concerned that allowing an entity to own more than one television station in a market could decrease the amount of children's educational and informational programming available to families in those communities. I did not want to see the amount and diversity of such programming diminished if stations that are commonly owned in the same market simply re-run the same shows on each station. Accordingly, I was pleased that we clarified in the order that commonly owned stations must air distinct children's programming to comply with our rules.

Second, our decision also leads the Commission down a path of providing more opportunities for small businesses, many of which are minority- and woman-owned businesses. The order restricts transfers of most existing combinations that fall out of compliance with our new rules unless the purchaser is a small broadcaster. In doing so, we are creating new opportunities for participation in broadcasting without threatening diversity or competition in these markets.

Third, I also am pleased that, as part of this decision, we decided to issue a Further Notice of Proposed Rulemaking to explore opportunities to advance ownership by minorities and women in broadcasting. Furthermore, I commend Chairman Powell on his formation of a Federal Advisory Committee to assist the agency in creating new opportunities for minorities and women in the communications sector.

Conclusion

It goes without saying that *none* of us wants to see media ownership concentrated in the hands of a few. While reasonable minds can differ about which particular restrictions might best promote this goal — national ownership caps that vary by only five percentage points, a minimum of six versus eight owners of local television stations in a market, and so forth — we should recognize that these are in fact issues on which reasonable people may disagree. For me, given the rules the Commission adopted Monday, the breakneck pace of technological development, and the ever-increasing number of pipelines into consumers' homes, it is simply not possible to monopolize the flow of information in today's world.

The net result of our Order is *balance*: We have preserved core values by maintaining safeguards to protect against undue concentration, we have altered rules as necessary to respond to the dramatic changes that have occurred in the marketplace since the adoption of our media ownership rules many years ago, and we have provided a rigorous justification with an exhaustive study based on the record. Sometimes the facts have led us to strengthen former restrictions; sometimes they have led us to relax them in part. But in all cases our decisions were based on facts rather than fears. That is what the Communications Act requires, that is what the courts require, and that is what the First Amendment requires.